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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-10

DAVID MOOR, *et al.*,

Petitioners,

vs.

COUNTY OF ALAMEDA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

APPENDIX.

Chronological List of Relevant Docket Entries.*

February 12, 1970 —Plaintiffs' complaints filed in U.S. District Court for the Northern District of California

March 9, 1970 —Defendants' answers filed

August 18, 1970 —Defendant County of Alameda's motion to dismiss filed in *Rundle* case

*All entries noted apply in both the *Moor* and *Rundle* cases unless otherwise indicated.

September 14, 1970 —Defendant County of Alameda's motion to dismiss filed in *Moor* case

November 30, 1970 —Plaintiffs' opposition to defendant County of Alameda's motions to dismiss filed

March 31, 1971 —Order filed granting defendant County of Alameda's motion to dismiss in *Rundle* case and requesting further points and authorities in *Moor* case on diversity jurisdiction issue (Appendix D to petition for writ of certiorari)

April 9, 1971 —Defendant County of Alameda's further points and authorities in support of its motion to dismiss filed in *Moor* case

April 20, 1971 —Plaintiffs' further points and authorities in opposition to defendant County of Alameda's motion to dismiss filed in *Moor* case

April 23, 1971 —Plaintiffs' motion for reconsideration of order granting defendant County of Alameda's motion to dismiss filed in *Rundle* case

April 29, 1971 —Defendant County of Alameda's further points and authorities in support of its motion to dismiss filed in *Moor* case

May 10, 1971 —Defendant County of Alameda's opposition to plaintiffs' motion

to reconsider filed in *Rundle* case

May 18, 1971 —Plaintiffs' reply to defendant County of Alameda's opposition to plaintiffs' motion for reconsideration filed in *Rundle* case

August 25, 1971 —Order granting defendant County of Alameda's motion to dismiss filed in *Moor* case (Appendix E to petition for writ of certiorari)

August 30, 1971 —Order affirming prior order granting defendant County of Alameda's motion to dismiss filed in *Rundle* case (Appendix F to petition for writ of certiorari)

September 3, 1971 —Plaintiffs' requests for entry of final judgment as to less than all parties filed

September 7, 1971 —Orders dismissing defendant County of Alameda filed

September 20, 1971 —Judgment of District Court entered dismissing defendant County of Alameda in *Moor* case

September 22, 1971 —Judgment of District Court entered dismissing defendant County of Alameda in *Rundle* case

October 18, 1971 —Plaintiffs' notices of appeal filed

January 24, 1972 —Order of the Court of Appeals for the Ninth Circuit consolidating the appeals in the *Rundle* and *Moor* cases (Appendix C to petition for writ of certiorari)

April 12, 1972 —Opinion of the Court of Appeals for the Ninth Circuit affirming the orders of the District Court dismissing the defendant County of Alameda (Appendix A to petition for writ of certiorari)

April 24, 1972 —Petition for rehearing filed

May 30, 1972 —Order of the Court of Appeals for the Ninth Circuit denying plaintiffs-appellants' petition for rehearing and rejecting suggestion for rehearing en banc (Appendix B to petition for writ of certiorari)

Complaint for Deprivation of Civil Rights and for Personal Injuries.

United States District Court, Northern District of California.

David Moor, Plaintiff, v. Frank I. Madigan, Glen Dyer, Thomas L. Houchens, Louis Santucci, Lawrence L. Riche, and County of Alameda, Defendants. C-70 333 RFP.

Filed: Feb. 12, 1970.

Plaintiff alleges:

FIRST CAUSE OF ACTION

I.

This action arises under the United States Constitution, Amendment XIV, §1 and under 42 U.S.C. §§1981, 1983, 1985, 1986 and 1988, as hereinafter more fully appears. Jurisdiction is conferred on this court by 28 U.S.C. §§1332 and 1343.

II.

At all times mentioned herein plaintiff was, and now is, a citizen of the United States and of the State of Illinois. Plaintiff is informed and believes, and thereupon alleges, that each of the defendants is a citizen of the State of California. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars.

III.

At all times mentioned herein, defendant County of Alameda was a county and political subdivision of the State of California, duly organized and existing under the laws of the State of California, and has consented to be sued by virtue of the California Tort Claims Act of 1963 (Cal. Govt. Code §§810 et seq.).

IV.

Plaintiff is informed and believes and thereon alleges that at all times mentioned herein defendant Frank I. Madigan was the Sheriff of the defendant County of Alameda, and defendants Glen Dyer, Thomas L. Houchens, Louis Santucci, and Lawrence L. Riche were, and still are, Deputy Sheriffs for the defendant County of Alameda. In doing the things hereinafter described, each of the above named defendants acted within the course and scope of said employment, and each was the agent, servant and employee of each of their co-defendants. As such, their acts are imputed to the defendant County of Alameda.

V.

Prior to the commencement of this action, and on or about August 20, 1969, plaintiff caused to be served on defendant County of Alameda a claim for damages arising from the matters hereinafter set forth. Said claim was rejected by operation of law on October 6, 1969.

VI.

On or about May 15, 1969, the above-named individual defendants, and each of them, in doing all of the things hereinafter mentioned, acted under color of their authority as such and under color of the statutes, ordinances, regulations, customs and usages of the State of California, the County of Alameda, and the Sheriff's Department for the County of Alameda.

VII.

On or about May 15, 1969, in the State of California, defendants, and each of them, and certain other police officer personnel then subject to the command of defendant Frank I. Madigan, conspired together and maliciously and wilfully entered into a scheme to de-

prive persons who were lawfully upon the public streets in the City of Berkeley, County of Alameda, State of California, of rights, privileges and immunities secured to them by the United States Constitution and laws, and formed the deliberate design and purpose to declare otherwise lawful assembly and speech as riotous in order to allow defendants, and each of them, as well as said other police officer personnel, to indiscriminately shoot at and otherwise molest said persons.

VIII.

In pursuance of said conspiracy and scheme, defendant Lawrence L. Riche, on or about May 15, 1969, at approximately 3:45 p.m., intentionally, wilfully, and without cause or provocation, and without prior warning, fired a shotgun at plaintiff, at a time when plaintiff was lawfully upon the public street, namely the corner of Parker and Chilton Way, in the City of Berkeley, County of Alameda, State of California. Said conduct of said defendant was without justification, statutory or otherwise. Said defendant thereafter immediately departed from the scene of the shooting, without attempting to render any aid whatever to said plaintiff.

IX.

By reason of the premises and defendant's said conduct, plaintiff was deprived of rights, privileges and immunities secured to him by the United States Constitution and laws in that said shooting amounted to an arbitrary intrusion by said defendant into the security of plaintiff's person and was not authorized by law, and in that said contacts on plaintiff's person deprived plaintiff of life and liberty, without due process of law.

X.

As a direct and proximate result of said wrongful act by said defendant, plaintiff was injured in his health, strength and activity, sustained bodily injury, and shock and injury to his nervous system, and said injuries have caused, and continue to cause, him great mental and physical pain and suffering. Plaintiff is informed and believes, and thereon alleges, that said injuries will result in his permanent disability. By reason of the aforesaid, plaintiff is entitled to general damages in the sum of $100,000.

XI.

As a further direct and proximate result of said wrongful act and of the said injuries, plaintiff was required to, and did, employ physicians to examine, treat and care for him, and incurred medical and incidental expenses for such examination, treatment and care. The exact amount of such expenses is unknown to plaintiff at this time, and he will ask leave to amend this pleading to set forth said sums when the same have been ascertained.

XII.

By reason of the facts hereinabove alleged, plaintiff is entitled to punitive damages from defendants and each of them, except for the defendant County of Alameda, in the amount of $500,000.

SECOND CAUSE OF ACTION

XIII.

Plaintiff realleges and incorporates by reference each and every allegation contained in paragraphs I through VI, and IX through XII of the First Cause of Action.

XIV.

On or about May 15, 1969, at approximately 3:45 p.m., defendant Lawrence L. Riche intentionally, wilfully, maliciously, wrongfully, and without cause or provocation, and without prior warning, fired a shotgun at plaintiff at a time when plaintiff was lawfully upon the public street, namely the corner of Parker and Chilton Way, in the City of Berkeley, County of Alameda, State of California. Said conduct of said defendant was without justification, statutory or otherwise. Said defendant thereafter immediately departed from the scene of the shooting without attempting to render any aid whatever to said plaintiff.

THIRD CAUSE OF ACTION

XV.

Plaintiff realleges and incorporates by reference each and every allegation contained in paragraphs II through V and X through XII of the First Cause of Action, and paragraph XIV of the Second Cause of Action.

FOURTH CAUSE OF ACTION

XVI.

Plaintiff realleges and incorporates by reference each and every allegation contained in paragraphs II through V and X and XI of the First Cause of Action.

XVII.

On or about May 15, 1969, at approximately 3:45 p.m., defendant Lawrence L. Riche negligently and carelessly fired a shotgun at plaintiff at a time when plaintiff was lawfully upon the public street, namely the corner of Parker and Chilton Way, in the City of Berkeley, County of Alameda, State of California.

WHEREFORE, plaintiff prays for judgment against the defendants, and each of them, as follows:

1. General damages on the first, second, third and fourth causes of action against each of the defendants in the sum of $100,000.

2. Exemplary and punitive damages on the first, second and third causes of action against each of the defendants, except for the defendant County of Alameda, in the sum of $500,000.

3. A reasonable attorneys' fee on the first and second causes of action against each of the defendants.

4. All medical and incidental expenses according to proof on the first, second, third and fourth causes of action against each of the defendants.

5. For costs of suit incurred herein; and

6. For such other and further relief as this court may deem just and proper.

RICHARDS, WATSON & HEMMERLING

/s/ By Ronald M. Greenberg
Ronald M. Greenberg
Attorneys for Plaintiff

Answer to Complaint and Demand for a Jury Trial.

United States District Court, Northern District of California.

David Moor, Plaintiff, vs. Frank I. Madigan, Glen Dyer, Thomas L. Houchens, Louis Santucci, Lawrence L. Riche, and County of Alameda, Defendants. No. C-70 333-RFP.

Filed: March 9, 1970.

COME NOW COUNTY OF ALAMEDA, a body politic and a political subdivision of the State of California, FRANK I. MADIGAN, THOMAS L. HOUCHENS, GLEN DYER, LOUIS SANTUCCI and LAWRENCE L. RICHE, six of the defendants above named, and appearing for themselves alone and answering plaintiff's Complaint on file herein, admit, deny and allege as follows, to wit:

I

Answering Paragraph II of plaintiff's First Cause of Action, these answering defendants allege that they have no information or belief upon the subject sufficient to enable them to answer said paragraph, and basing their denial upon that ground, deny the allegations therein contained.

II

Answering Paragraphs I, VI, VII, VIII, IX, and XI, and each of them, these answering defendants deny each and every, all and singular, generally and specifically, the allegations contained in said pararaphs.

III

Answering Paragraph III, these answering defendants admit that at all times mentioned in the plaintiff's Com-

plaint, defendant COUNTY OF ALAMEDA was a body politic and political subdivision of the State of California, duly organized and existing under the laws of the State of California, and has consented to be sued pursuant to law by virtue of the California Tort Claims Act of 1963 (Cal. Govt. Code §§ 810 et seq.).

In all other respects save and except as hereinbefore admitted, these answering defendants deny the allegations contained in said Paragraph III.

IV

Answering Paragraph IV, these answering defendants admit that at all times mentioned in the plaintiff's Complaint, defendant FRANK I. MADIGAN was the Sheriff of the defendant COUNTY OF ALAMEDA. Further answering Paragraph IV, these answering defendants admit that defendants THOMAS L. HOUCHENS, GLEN DYER, LOUIS SANTUCCI and LAWRENCE L. RICHE were Deputy Sheriffs and civil defense disaster workers.

In all other respects save and except as hereinbefore admitted, these answering defendants deny the allegations contained in said Paragraph IV.

V

Answering Paragraph X and XII of said alleged cause of action, these answering defendants specifically deny the allegations therein contained; and further in this connection these answering defendants specifically deny that plaintiff has been damaged in the sum of $100,000.00 or $500,000.00, or in any other sum, or at all.

WHEREFORE, these answering defendants pray judgment as hereinafter set forth.

ANSWERING THE SECOND ALLEGED CAUSE OF ACTION in plaintiff's Complaint contained, these answering defendants admit, deny and allege as follows:

I

Answering Paragraph XIII of said alleged cause of action, these answering defendants make the same answers thereto as they made to each and every paragraph of the alleged First Cause of Action contained in said complaint, and incorporates herein by reference their answers to said paragraphs with the same force and effect as though fully set forth herein.

II

Answering Paragraph XIV of said alleged cause of action, these answering defendants deny each and every, all and singular, generally and specifically, the allegations therein contained.

WHEREFORE, these answering defendants pray judgment as hereinafter set forth.

ANSWERING THE THIRD ALLEGED CAUSE OF ACTION in plaintiff's complaint contained, these answering defendants admit, deny and allege as follows:

I

Answering Paragraph XV of said alleged cause of action, these answering defendants make the same answers thereto as they made to each and every paragraph of the alleged First Cause of Action contained in said complaint, and incorporates herein by reference their answers to said paragraphs with the same force and effect as though fully set forth herein. Further answering Paragraph XV of said alleged cause of action, these answering defendants make the same answers

thereto as they made to each and every paragraph of the alleged Second Cause of Action contained in said complaint, and incorporates herein by reference their answers to said paragraphs with the same force and effect as though fully set forth herein.

WHEREFORE, these answering defendants pray judgement as hereinafter set forth.

ANSWERING THE FOURTH ALLEGED CAUSE OF ACTION in plaintiff's Complaint contained, these answering defendants admit, deny, and allege as follows:

I

Answering Paragraph XVI of said alleged cause of action, these answering defendants make the same answers thereto as it made to each and every paragraph of the alleged First Cause of Action contained in said complaint, and incorporates herein by reference its answers to said paragraphs with the same force and effect as though fully set forth herein.

II

Answering Paragraph XVII of said alleged cause of action, these answering defendants deny each and every, all and singular, generally and specifically, the allegations therein contained.

WHEREFORE, these answering defendants pray judgment as hereinafter set forth.

AND, AS AND FOR A SECOND, SEPARATE AND DISTINCT ANSWER AND DEFENSE to plaintiff's Complaint on file herein, and each cause of action contained therein, these answering defendants allege that the complaint fails to state facts sufficient to constitute a cause of action against these answering defendants.

WHEREFORE, these answering defendants pray judgment as hereinafter set forth.

AND, AS AND FOR A THIRD, SEPARATE AND DISTINCT ANSWER AND DEFENSE to plaintiff's Complaint on file herein, and each cause of action contained therein, these answering defendants allege that plaintiff was himself guilty of carelessness and negligence in and about the matters and things set forth in each of the alleged causes of action contained in said complaint; that said carelessness and negligence on the part of plaintiff proximately caused and contributed to the happening of the incident or incidents in question and the resultant alleged injuries and/or damage to plaintiff, if any.

WHEREFORE, these answering defendants pray judgment as hereinafter set forth.

AND, AS AND FOR A FOURTH, SEPARATE AND DISTINCT ANSWER AND DEFENSE to plaintiff's complaint on file herein, and each cause of action contained therein, these answering defendants allege that plaintiff, prior to and at the time of the incident or incidents complained of, voluntarily assumed the risk of injury and damage, and that any damage suffered by plaintiff at all times herein mentioned was voluntarily assumed by said plaintiff.

WHEREFORE, these answering defendants pray judgment as hereinafter set forth.

AND, AS AND FOR A FIFTH, SEPARATE AND DISTINCT ANSWER AND DEFENSE to plaintiff's complaint on file herein, and each cause of action contained therein, these answering defendants allege that at all times mentioned herein, COUNTY OF ALA-

MEDA was a public entity; that FRANK I. MADIGAN was the Sheriff and director of civil defense of said County; that defendant deputy sheriffs were duly authorized peace officers and civil defense disaster workers employed by said County; that at all times herein mentioned, said FRANK I. MADIGAN and said deputy sheriffs were performing their duties in good faith and pursuant to the discretion vested in them to execute and enforce the law and in the suppression of riots.

WHEREFORE, these answering defendants pray judgment as hereinafter set forth.

AND, AS AND FOR A SIXTH, SEPARATE AND DISTINCT ANSWER AND DEFENSE to plaintiff's complaint on file herein, and each cause of action contained therein, these answering defendants allege that at all times mentioned in said complaint defendants acted in good faith and without malice and had reasonable cause to believe that plaintiff had committed a violation of the Penal Code of the State of California; that plaintiff's complaint, and each cause of action therein contained, is barred by the provisions of California Government Code §§820.6, 821, 821.6, 844.6, 845, 845.2 and 845.4.

WHEREFORE, these answering defendants pray judgment as hereinafter set forth.

AND, AS AND FOR A SEVENTH, SEPARATE AND DISTINCT ANSWER AND DEFENSE to plaintiff's complaint on file herein, and each cause of action contained therein, these answering defendants allege that to the extent that these answering defendants were involved in any of the matters alleged, which involvement is expressly denied, said acts were per-

formed to terminate or prevent a breach of the peace, riot, rout, affray or other crime in which it appeared that plaintiff was participating, assisting or about to participate or assist, and that such breach of the peace, riot, rout, affray or other crime was one which threatened death or serious bodily harm.

WHEREFORE, these answering defendants pray judgment as hereinafter set forth.

AND, AS AND FOR AN EIGHTH, SEPARATE AND DISTINCT ANSWER AND DEFENSE to plaintiff's complaint on file herein, and each cause of action contained therein, these answering defendants allege that plaintiff's complaint is barred by the provisions of California Penal Code §§835, 835(a) and 836.

WHEREFORE, these answering defendants pray judgment as hereinafter set forth.

AND, AS AND FOR A NINTH, SEPARATE AND DISTINCT ANSWER AND DEFENSE to each of the alleged causes of action contained in plaintiff's complaint on file herein, these answering defendants allege that plaintiff's complaint is barred by the provisions of California Civil Code §1714.5.

WHEREFORE, these answering defendants pray judgment as hereinafter set forth.

AND, AS AND FOR A TENTH, SEPARATE AND DISTINCT ANSWER AND DEFENSE to each of the alleged causes of action contained in plaintiff's complaint on file herein, these answering defendants allege that at all times mentioned in plaintiff's complaint the COUNTY OF ALAMEDA was a public entity in the State of California; that in the absence of

statute a public entity is not liable for injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person; that plaintiff's complaint is barred by the provisions of California Government Code §§815 (a)(b), 815.2 (a)(b), 815.4, 818, 818.2, 818.6, 820.2, 820.4, 820.8, 821.4 and 822.2, in that at all times mentioned in plaintiff's complaint public employees acting on behalf of the COUNTY OF ALAMEDA were exercising due care in the good faith execution or enforcement of law, and were acting pursuant to the discretion vested in them; that at all times mentioned in plaintiff's complaint plaintiff had knowledge, or by the exercise of reasonable care, should have had knowledge, that he was participating in a riot or would reasonably appear to be participating in a riot and that at all times mentioned in plaintiff's complaint only reasonable force was used in self defense and in defense of others by public employees acting on behalf of the COUNTY OF ALAMEDA.

WHEREFORE, these answering defendants pray that plaintiff take nothing by his complaint on file herein, and each cause of action contained therein, and that these answering defendants have and recover their costs of suit herein incurred, and to be incurred, and for such other and further relief as to the Court may seem proper in the premises.

Dated: March 6, 1970.

RICHARD J. MOORE, County Counsel
CROSBY, HEAFEY, ROACH & MAY
PROFESSIONAL CORPORATION
/s/ By Peter W. Davis
PETER W. DAVIS,
Attorneys for defendants

DEMAND FOR A JURY TRIAL

The defendants, COUNTY OF ALAMEDA, GLEN DYER, LOUIS SANTUCCI, LAWRENCE L. RICHE, THOMAS L. HOUCHENS and FRANK I. MADIGAN, hereby demand a trial by jury in the above entitled action.

Dated: March 6, 1970.

RICHARD J. MOORE, County Counsel
CROSBY, HEAFEY, ROACH & MAY
PROFESSIONAL CORPORATION

/s/ By Peter W. Davis
PETER W. DAVIS
Attorneys for defendants

Order.

In the United States District Court, for the Northern District of California.

David Moor, Plaintiff, vs. Frank I. Madigan, et al., Defendants. No. C-70 333 RFP.

Filed: Sept. 7, 1971.

Defendant COUNTY OF ALAMEDA, a body politic and a political subdivision of the State of California, having moved for an order for dismissal pursuant to Rule 12; the matter having been fully briefed and argued; and the Court having granted said motion for dismissal by its memorandum decision of August 25, 1971, the Clerk of this Court shall enter a final judgment upon the order dismissing defendant COUNTY OF ALAMEDA, a body politic and a political subdivision of the State of California, from plaintiff's first, second, third and fourth causes of action, and each of them, and the undersigned expressly determines that there is no just reason for delay in the entry of final judgment on this order.

Dated: September 3, 1971.

/s/ Robert Peckham
United States District Judge

Judgment.

In the United States District Court, for the Northern District of California.

David Moor, Plaintiff, vs. Frank I. Madigan, et al., Defendants. No. C-70 333-RFP.

Filed: Sept. 20, 1971.

An Order having been entered herein on September 3, 1971 for the dismissal of plaintiff's complaint against the COUNTY OF ALAMEDA, and the Court having certified therein that there was no just reason for delay, and expressly directing the entry of final judgment, it is

ADJUDGED, that the complaint be and the same hereby is dismissed as to the defendant COUNTY OF ALAMEDA.

DATED: Sept. 20, 1971.

/s/ Robert Peckham
U.S. District Judge

Complaint for Deprivation of Civil Rights and for Personal Injuries.

United States District Court, Northern District of California.

William Donovan Rundle, Jr., a minor, by William D. Rundle, his guardian ad litem; William D. Rundle and Sarah Rundle, Plaintiffs, v. Frank I. Madigan; Glen Dyer; Thomas L. Houchens; Louis Santucci, Lawrence L. Riche; and County of Alameda, Defendants. C-70 334 GBH.

Filed: Feb. 12, 1972.

Plaintiffs allege:

FIRST CAUSE OF ACTION

I.

This action arises under the United States Constitution, Amendment XIV, §1 and under 42 U.S.C. §§1981, 1983, 1985, 1986 and 1988, as hereinafter more fully appears. Jurisdiction is conferred on this court by 28 U.S.C. §1343.

II.

At all times mentioned herein plaintiffs were, and now are, citizens of the United States and of the State of California. For purposes of this action William D. Rundle was appointed by the above-entitled court, and now is, the guardian ad litem of plaintiff William Donovan Rundle, Jr., a minor.

III.

At all times mentioned herein, defendant County of Alameda was a county and political subdivision of the State of California, duly organized and existing under the laws of the State of California, and has con-

sented to be sued by virtue of the California Tort Claims Act of 1963 (Cal. Govt. Code §§810 et seq.).

IV.

Plaintiffs are informed and believe and thereon allege that at all times mentioned herein defendant Frank I. Madigan was the Sheriff of the defendant County of Alameda, and defendants Glen Dyer, Thomas L. Houchens, Louis Santucci and Lawrence L. Riche were Deputy Sheriffs for the defendant County of Alameda. In doing the things hereinafter described, each of the above named defendants acted within the course and scope of said employment, and each was the agent, servant and employee of each of their co-defendants. As such, their acts are imputed to the defendant County of Alameda.

V.

Prior to the commencement of this action, and on or about August 22, 1969, plaintiffs caused to be served on defendant County of Alameda a claim for damages arising from the matters hereinafter set forth. Said claim was rejected by operation of law on October 6, 1969.

VI.

On or about May 15, 1969, the above named individual defendants, and each of them, in doing all of the things hereinafter mentioned, acted under color of their authority as such and under color of the statutes, ordinances, regulations, customs and usages of the State of California, the County of Alameda, and the Sheriff's Department for the County of Alameda.

VII.

On or about May 15, 1969, in the State of California, defendants, and each of them, and certain other

police officer personnel then subject to the command of defendant Frank I. Madigan, conspired together and maliciously and wilfully entered into a scheme to deprive persons who were lawfully upon the public streets in the City of Berkeley, County of Alameda, State of California, of rights, privileges and immunities secured to them by the United States Constitution and laws, and formed the deliberate design and purpose to declare otherwise lawful assembly and speech as riotous in order to allow defendants, and each of them, as well as said other police officer personnel, to indiscriminately shoot at and otherwise molest said persons.

VIII.

In pursuance of said conspiracy and scheme, defendant Lawrence L. Riche, on or about May 15, 1969, at approximately 3:45 p.m., intentionally, wilfully, and without cause or provocation, and without prior warning, fired a shotgun at plaintiff William Donovan Rundle, Jr., at a time when said plaintiff was lawfully upon the public street, namely the corner of Parker and Chilton Way, in the City of Berkeley, County of Alameda, State of California. Said conduct of said defendant was without justification, statutory or otherwise. Said defendant thereafter immediately departed from the scene of the shooting, without attempting to render any aid whatever to said plaintiff.

IX.

By reason of the premises and defendant's said conduct, plaintiff William Donovan Rundle, Jr. was deprived of rights, privileges and immunities secured to him by the United States Constitution and laws in that said shooting amounted to an arbitrary intrusion by said defendant into the security of plaintiff's person

and was not authorized by law, and in that said contacts on plaintiff's person deprived said plaintiff of life and liberty without due process of law.

X.

As a direct and proximate result of said wrongful act by said defendant, plaintiff William Donovan Rundle, Jr. was injured in his health, strength and activity, sustained bodily injury, and shock and injury to his nervous system, and said injuries have caused, and continue to cause, him great mental and physical pain and suffering. Said plaintiff is informed and believes, and thereon alleges, that said injuries will result in his permanent disability. By reason of the aforesaid, plaintiff is entitled to general damages in the sum of $500,000.

XI.

As a further direct and proximate result of said wrongful act and of the said injuries, said plaintiff's parents, plaintiffs William D. Rundle and Sarah Rundle were required to, and did, employ physicians to examine, treat and care for him, and incurred medical and incidental expenses for such examination, treatment and care. The exact amount of such expenses is unknown to plaintiffs at this time, and they will ask leave to amend this pleading to set forth said sums when the same have been ascertained.

XII.

By reason of the facts hereinabove alleged, plaintiff William Donovan Rundle, Jr. is entitled to punitive damages from the defendants, and each of them, except for the defendant County of Alameda, in the amount of $500,000.

SECOND CAUSE OF ACTION

XIII.

Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs I through VI, and IX through XII of the First Cause of Action.

XIV.

On or about May 15, 1969, at approximately 3:45 p.m., defendant Lawrence L. Riche intentionally, wilfully, maliciously, wrongfully, and without cause or provocation, and without prior warning, fired a shotgun at plaintiff William Donovan Rundle, Jr. at a time when said plaintiff was lawfully upon the public street, namely the corner of Parker and Chilton Way, in the City of Berkeley, County of Alameda, State of California. Said conduct of said defendant was without justification, statutory or otherwise. Said defendant thereafter immediately departed from the scene of the shooting, without attempting to render any aid whatever to said plaintiff.

THIRD CAUSE OF ACTION

XV.

Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs II through V and X through XII of the First Cause of Action and paragraph XIV of the Second Cause of Action.

FOURTH CAUSE OF ACTION

XVI.

Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs II through V and X and XI of the First Cause of Action.

XVII.

On or about May 15, 1969, at approximately 3:45 p.m., defendant Lawrence L. Riche negligently and carelessly fired a shotgun at plaintiff William Donovan Rundle, Jr. at a time when said plaintiff was lawfully upon the public street, namely the corner of Parker and Chilton Way, in the City of Berkeley, County of Alameda, State of California.

WHEREFORE, plaintiffs pray for judgment against the defendants, and each of them, as follows:

Plaintiff William Donovan Rundle, Jr.:

1. General damages on the first, second, third and fourth causes of action against each of the defendants in the sum of $500,000.

2. Exemplary and punitive damages on the first, second and third causes of action against each of the defendants, except for the defendant County of Alameda, in the sum of $500,000.

3. A reasonable attorneys' fee on the first and second causes of action against each of the defendants.

Plaintiffs William D. Rundle and Sarah Rundle:

4. All medical and incidental expenses according to proof on the first, second, third and fourth causes of action against each of the defendants.

All plaintiffs:

5. For costs of suit incurred herein; and

6. For such other and further relief as this court may deem just and proper.

RICHARDS, WATSON & HEMMERLING

/s/ By Ronald M. Greenberg

Ronald M. Greenberg

Attorneys for Plaintiffs

Answer to Complaint and Demand for a Jury Trial.

United States District Court, Northern District of California.

William Donovan Rundle, Jr., a minor, by William D. Rundle, his guardian ad litem; William D. Rundle and Sarah Rundle, Plaintiffs, vs. Frank I. Madigan, Glen Dyer, Thomas L. Houchens, Louis Santucci, Lawrence L. Riche, and County of Alameda, Defendants. No. C-70 334-GBH.

Filed: March 9, 1970.

COME NOW COUNTY OF ALAMEDA, a body politic and a political subdivision of the State of California, FRANK I. MADIGAN, THOMAS L. HOUCHENS, GLEN DYER, LOUIS SANTUCCI and LAWRENCE L. RICHIE. six of the defendants above named, and appearing for themselves alone and answering plaintiffs' Complaint on file herein, admit, deny and allege as follows, to wit:

I

Answering Paragraph II of plaintiffs' First Cause of Action, these answering defendants allege that they have no information or belief upon the subject sufficient to enable them to answer said paragraph, and basing their denial upon that ground, deny the allegations therein contained.

II

Answering Paragraphs I, VI, VII, VIII, IX and XI, and each of them, these answering defendants deny each and every, all and singular, generally and specifically, the allegations contained in said paragraphs.

III

Answering Paragraph III, these answering defendants admit that at all times mentioned in the plaintiffs' Com-

plaint, defendant COUNTY OF ALAMEDA was a body politic and political subdivision of the State of California, duly organized and existing under the laws of the State of California, and has consented to be sued pursuant to law by virtue of the California Tort Claims Act of 1963 (Cal. Govt. Code §§ 810 et seq.).

In all other respects save and except as hereinbefore admitted, these answering defendants deny the allegations contained in said Paragraph III.

IV

Answering Paragraph IV, these answering defendants admit that at all times mentioned in the plaintiffs' Complaint, defendant FRANK I. MADIGAN was the Sheriff of the defendant COUNTY OF ALAMEDA. Further answering Paragraph IV, these answering defendants admit that defendants THOMAS L. HOUCHENS, GLEN DYER, LOUIS SANTUCCI and LAWRENCE L. RICHE were Deputy Sheriffs and civil defense disaster workers.

In all other respects save and except as hereinbefore admitted, these answering defendants deny the allegations contained in said Paragraph IV.

V

Answering Paragraph X and XII of said alleged cause of action, these answering defendants specifically deny the allegations therein contained; and further in this connection these answering defendants specifically deny that plaintiff has been damaged in the sum of $500,000 or in any other sum, or at all.

WHEREFORE, these answering defendants pray judgment as hereinafter set forth.

ANSWERING THE SECOND ALLEGED CAUSE OF ACTION IN plaintiffs' Complaint contained, these answering defendants admit, deny and allege as follows:

I

Answering Paragraph XIII of said alleged cause of action, these answering defendants make the same answers thereto as they made to each and every paragraph of the alleged First Cause of Action contained in said complaint, and incorporates herein by reference their answers to said paragraphs with the same force and effect as though fully set forth herein.

II

Answering Paragraph XIV of said alleged cause of action, these ansering defendants deny each and every, all and singular, generally and specifically, the allegations therein contained.

WHEREFORE, these answering defendants pray judgment as hereinafter set forth.

ANSWERING THE THIRD ALLEGED CAUSE OF ACTION in plaintiffs' complaint contained, these answering defendants admit, deny and allege as follows:

I

Answering Paragraph XV of said alleged cause of action, these answering defendants make the same answers thereto as they made to each and every paragraph of the alleged First Cause of Action contained in said complaint, and incorporates herein by reference their answers to said paragraphs with the same force and effect as though fully set forth herein. Further answering Paragraph XV of said alleged cause of action, these answering defendants make the same answers

thereto as they made to each and every paragraph of the alleged Second Cause of Action contained in said complaint, and incorporates herein by reference their answers to said paragraphs with the same force and effect as though fully set forth herein.

WHEREFORE, these answering defendants pray judgment as hereinafter set forth.

ANSWERING THE FOURTH ALLEGED CAUSE OF ACTION in plaintiffs' complaint contained, these answering defendants admit, deny, and allege as follows:

I

Answering Paragraph XVI of said alleged cause of action, these answering defendants make the same answers thereto as it made to each and every paragraph of the alleged First Cause of Action contained in said complaint, and incorporate herein by reference its answers to said paragraphs with the same force and effect as though fully set forth herein.

II

Answering Paragraph XVII of said alleged cause of action, these answering defendants deny each and every, all and singular, generally and specifically, the allegations therein contained.

WHEREFORE, these answering defendants pray judgment as hereinafter set forth.

AND, AS AND FOR A SECOND, SEPARATE AND DISTINCT ANSWER AND DEFENSE to plaintiffs' complaint on file herein, and each cause of action contained therein, these answering defendants allege that the complaint fails to state facts sufficient to constitute a cause of action against these answering defendants.

WHEREFORE, these answering defendants pray judgment as hereinafter set forth.

AND, AS AND FOR A THIRD, SEPARATE AND DISTINCT ANSWER AND DEFENSE to plaintiffs' complaint on file herein, and each cause of action contained therein, these answering defendants allege that plaintiffs were themselves guilty of carelessness and negligence in and about the matters and things set forth in each of the alleged causes of action contained in said complaint; that said carelessness and negligence on the part of plaintiffs proximately caused and contributed to the happening of the incident or incidents in question and the resultant alleged injuries or damage to plaintiffs, if any.

WHEREFORE, these answering defendants pray judgment as hereinafter set forth.

AND, AS AND FOR A FOURTH, SEPARATE AND DISTINCT ANSWER AND DEFENSE to plaintiffs' complaint on file herein, and each cause of action contained therein, these answering defendants allege that plaintiffs, prior to and at the time of the incident or incidents complained of, voluntarily assumed the risk of injury and damage, and that any damage suffered by plaintiffs at all times herein mentioned was voluntarily assumed by said plaintiffs.

WHEREFORE, these answering defendents pray judgment as hereinafter set forth.

AND, AS AND FOR A FIFTH, SEPARATE AND DISTINCT ANSWER AND DEFENSE to plaintiffs' complaint on file herein, and each cause of action contained therein, these answering defendants allege that at all times mentioned herein, COUNTY OF ALAMEDA was a public entity; that FRANK I. MADI-

GAN was the Sheriff and director of civil defense of said County; that defendant deputy sheriffs were duly authorized peace officers and civil defense disaster workers employed by said County; that at all times herein mentioned, said FRANK I. MADIGAN and said deputy sheriffs were performing their duties in good faith and pursuant to the discretion vested in them to execute and enforce the law and in the suppression of riots.

WHEREFORE, these answering defendants pray judgment as hereinafter set forth.

AND, AS AND FOR A SIXTH, SEPARATE AND DISTINCT ANSWER AND DEFENSE to plaintiffs' complaint on file herein, and each cause of action contained therein, these answering defendants allege that at all times mentioned in said complaint defendants acted in good faith and without malice and had reasonable cause to believe that plaintiffs had committed a violation of the Penal Code of the State of California; that plaintiffs' complaint, and each cause of action therein contained, is barred by the provisions of California Government Code §§820.6, 821, 821.6, 844.6, 845, 845.2 and 845.4.

WHEREFORE, these answering defendants pray judgment as hereinafter set forth.

AND, AS AND FOR A SEVENTH, SEPARATE AND DISTINCT ANSWER AND DEFENSE to plaintiffs' complaint on file herein, and each cause of action contained therein, these answering defendants allege that to the extent that these answering defendants were involved in any of the matters alleged, which involvement is expressly denied, said acts were performed to terminate or prevent a breach of the peace, riot, rout,

affray or other crime in which it appeared that plaintiffs were participating, assisting or about to participate or assist, and that such breach of the peace, riot, rout, affray or other crime was one which threatened death or serious bodily harm.

WHEREFORE, these answering defendants pray judgment as hereinafter set forth.

AND, AS AND FOR AN EIGHTH, SEPARATE AND DISTINCT ANSWER AND DEFENSE to plaintiffs' complaint on file herein, and each cause of action contained therein, these answering defendants allege that plaintiffs' complaint is barred by the provisions of California Penal Code §§835, 835(a) and 836.

WHEREFORE, these answering defendants pray judgment as hereinafter set forth.

AND, AS AND FOR A NINTH, SEPARATE AND DISTINCT ANSWER AND DEFENSE to each of the alleged causes of action contained in plaintiffs' complaint on file herein, these answering defendants allege that plaintiffs' complaint is barred by the provisions of California Civil Code §1714.5.

WHEREFORE, these answering defendants pray judgment as hereinafter set forth.

AND, AS AND FOR A TENTH, SEPARATE AND DISTINCT ANSWER AND DEFENSE to each of the alleged causes of action contained in plaintiffs' complaint on file herein, these answering defendants allege that at all times mentioned in plaintiffs' complaint the COUNTY OF ALAMEDA was a public entity in the State of California; that in the absence of statute a public entity is not liable for injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person;

that plaintiffs' Complaint is barred by the provisions of California Government Code §§815 (a)(b), 815.2 (a)(b), 815.4, 818, 818.2, 818.6, 820.2, 820.4, 820.8, 821.4 and 822.2, in that at all times mentioned in plaintiffs' complaint public employees acting on behalf of the COUNTY OF ALAMEDA were exercising due care in the good faith execution or enforcement of law, and were acting pursuant to the discretion vested in them; that at all times mentioned in plaintiffs' complaint plaintiffs had knowledge, or by the exercise of reasonable care, should have had knowledge, that they were participating in a riot or would reasonably appear to be participating in a riot and that at all times mentioned in plaintiffs' complaint only reasonable force was used in self defense and in defense of others by public employees acting on behalf of the COUNTY OF ALAMEDA.

WHEREFORE, these answering defendants pray that plaintiffs take nothing by their complaint on file herein, and each cause of action contained therein, and that these answering defendants have and recover their costs of suit herein incurred, and to be incurred, and for such other and further relief as to the Court may seem proper in the premises.

Dated: March 6, 1970.

RICHARD J. MOORE, County Counsel
CROSBY, HEAFEY, ROACH & MAY
PROFESSIONAL CORPORATION

/s/ By Peter W. Davis
PETER W. DAVIS
Attorneys for defendants

DEMAND FOR A JURY TRIAL

The defendants, COUNTY OF ALAMEDA, GLEN DYER, LOUIS SANTUCCI, LAWRENCE L. RICHE, THOMAS L. HOUCHENS and FRANK I. MADIGAN, hereby demand a trial by jury in the above entitled action.

Dated: March 6, 1970.

RICHARD J. MOORE, County Counsel
CROSBY, HEAFEY, ROACH & MAY
PROFESSIONAL CORPORATION

/s/By Peter W. Davis
PETER W. DAVIS,
Attorneys for defendants

Order.

In the United States District Court, for the Northern District of California.

William Donovan Rundle, Jr., et al., Plaintiffs, vs. Frank I. Madigan, et al., Defendants. No. C-70 334 RFP.

FILED: Sept. 7, 1971.

Defendant COUNTY OF ALAMEDA, a body politic and a political subdivision of the State of California, having moved for an order for dismissal pursuant to Rule 12; the matter having been fully briefed and argued; and the Court having granted said motion for dismissal by its memorandum decision of August 25, 1971, [March 31, 1971 and August 30, 1971], the Clerk of this Court shall enter a final judgment upon the order dismissing defendant COUNTY OF ALAMEDA, a body politic and a political subdivision of the State of California, from plaintiffs' first, second, third and fourth causes of action, and each of them, and the undersigned expressly determines that there is no just reason for delay in the entry of final judgment on this order.

Dated: September 3, 1971.

/s/ Robert Peckham

United States District Judge

Judgment.

In the United States District Court, for the Northern District of California.

William Donovan Rundle, Jr., etc., et al., Plaintiffs, vs. Frank I. Madigan, et al., Defendants. No. C-70 334-RFP.

FILED: Sept. 20, 1971.

An Order having been entered herein on September 3, 1971 for the dismissal of plaintiffs' complaint against the COUNTY OF ALAMEDA, and the Court having certified therein that there was no just reason for delay, and expressly directing the entry of final judgment, it is

ADJUDGED, that the complaint be and the same hereby is dismissed as to the defendant COUNTY OF ALAMEDA.

DATED: Sept. 20, 1971.

/s/ Robert Peckham

U.S. District Judge

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IN THE

Supreme Court of the United States

October Term, 1971
No. .....

DAVID MOOR, *et al.*,

Petitioners,

vs.

COUNTY OF ALAMEDA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on April 12, 1971.[1]

[1]The petitioners in addition to David Moor are William Donovan Rundle, Jr., a minor, by William D. Rundle, his guardian ad litem; William D. Rundle and Sarah Rundle. The respondents in addition to the County of Alameda are Frank I. Madigan, Glenn Dyer, Thomas L. Houchens, Louis Santucci and Lawrence L. Riche. David Moor and the Rundles each filed a separate case in the district court against the above named respondents. Because the issues raised on appeal to the court below in each case are identical, except that the Moor case involves the additional issue of diversity jurisdiction, the court below ordered the appeals consolidated. (See Appendix C, *infra* at 14.)

Citations to Opinions Below.

The opinion of the Circuit Court of Appeals, a copy of which is attached hereto as Appendix A, *infra* at 1, is unreported as yet. A copy of the order of the Circuit Court of Appeals denying petitioners' petition for rehearing and for rehearing in banc is attached hereto as Appendix B, *infra* at 13. A copy of the order of the Circuit Court of Appeals consolidating the above captioned matters and granting petitioners' motion for an expedited hearing is attached hereto as Appendix C, *infra* at 14. Copies of the orders of the District Court, or portions thereof, which relate to the issues involved herein, are attached hereto as Appendices D, E and F, *infra* at 15, 18 and 21 respectively, and the order attached as Appendix F is reported in 331 F.Supp. 492. Portions of companion cases relating to the issues involved herein are attached hereto as Appendices G and H, *infra* at 31 and 32 respectively.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on April 12, 1972. A timely petition for rehearing was filed on April 24, 1972 and denied on May 30, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. Whether, if state law imposes vicarious liability upon its public entities for the Civil Rights Act (42 U.S.C. §§1981 *et seq.*) violations of the entities' employees, *Monroe v. Pape*, 365 U.S. 167 (1961), allows a federal court to use 42 U.S.C. §1988 to adopt that state law and obtain jurisdiction under 28 U.S.C.

§§1343(3) and (4) to impose that state-created liability.

2. Whether *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), allows a federal court the power to exercise jurisdiction over a party on a pendent state law claim when such party is not involved in the related federal claim.

3. Whether Alameda County is a "citizen" of California for diversity jurisdiction purposes.

Statutes Involved.

28 U.S.C. §§1343(3) and (4):

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

". . .

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

42 U.S.C. §1988:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the

United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

Statement of the Case.

The jurisdiction of the district court was invoked in each of these cases pursuant to 28 U.S.C. §§1343(3) and (4) because of questions arising under acts of Congress providing for the protection of civil rights (28 U.S.C. §§1981, 1983, 1985, 1986 and 1988). In the *Moor* case jurisdiction was also invoked pursuant to 28 U.S.C. §1332 because of diversity of citizenship, the plaintiff being a citizen of Illinois and the defendants citizens of California. Pendent state law claims against each of the defendants were also joined in each of the cases.

The pertinent facts are summarized in the decision of the court below and the following statement is from that decision:

> "The claims arose out of the May, 1969, People's Park" disturbance or riot, in which appellants were allegedly injured by an Alameda County deputy sheriff who was performing duties at that time and place on behalf of the County.

"On February 12, 1970, appellants brought actions against several deputies, the sheriff, and the County. The complaints against the County alleged federal causes of action under the Civil Rights Act, 42 U.S.C. sections 1981-1988, and pendent state claims under sections 810 *et seq.* of the California Government Code (hereinafter Tort Claims Act). Both federal and state causes of action were premised on the theory that the county could be held vicariously liable for the acts of the deputies.

"Both appellants alleged jurisdiction in the district court pursuant to 28 U.S.C. section 1343. Appellant Moor also alleged diversity jurisdiction under 28 U.S.C. section 1332.

"The County subsequently filed motions to dismiss the claims against it in each case, contending that, as to the Civil Rights Act claims, the County was not a "person" who could be sued under the Act. The County also argued that, as the federal claims were not viable, the pendent state claims must also be dismissed. In addition, in the *Moor* case, the County separately moved to dismiss for lack of diversity, contending in part that the County was not a "citizen" for federal diversity jurisdiction purposes.

"The trial court ultimately granted all of these motions and ordered that all claims against the County be dismissed. These appeals are taken from that order." Appendix A, *infra* at 1-2.

The court below subsequently affirmed these orders of the district court. (See Appendix A, *infra* at 1.) On May 30, 1972 petitioners' petition for rehearing in banc was denied. (See Appendix B, *infra* at 13.)

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED.

I.

There Is a Conflict in Decisions of the Circuit Courts of Appeals on Whether, if State Law Imposes Vicarious Liability Upon a Public Entity for the Civil Rights Act (42 U.S.C. §§1981 et seq.) Violations of the Entity's Employees, Monroe v. Pape, 365 U.S. 167 (1961), Allows a Federal Court to Use 42 U.S.C. §1988 to Adopt That State Law and Obtain Jurisdiction Under 28 U.S.C. §§1343(3) and (4) to Impose That State-Created Liability.

The decision of the court below (Appendix A, *infra* at 1) that *Monroe v. Pape*, 365 U.S. 167 (1961) precludes a federal court from imposing vicarious liability upon a public entity for the Civil Rights Act (42 U.S.C. §1981 *et seq.*) violations of the entity's employees, assuming state law imposes such vicarious liability, is in apparent conflict with the decision of the D.C. Circuit Court of Appeals in *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971) *petition for cert. filed*, 40 U.S.L.W. 3308 (U.S. Oct. 26, 1971) (No. 71-564), *cert. granted*, ... U.S. ...., 92 S.Ct. 683 (1972).[2] Moreover, this conflict has been expressly recognized by these two respective courts.

---

[2]As reported in the United States Law Week, the two questions presented are:

> "(1) May D.C. supervisory police officials be held liable to victim of false arrest and assault by D.C. policemen for their alleged negligence in training and supervising these officers? (2) May D.C. and supervisorial police officials be held liable under the 1871 Civil Rights Act to victim of false arrest and assault by D.C. policemen?"

Since the jurisdictional questions of pendent party and diversity are not involved in *Carter*, and since the nature of the Civil Rights Act jurisdiction issue raised in *Carter* (expanded scope of 42 U.S.C. §1983) may well differ from the related issue

In *Carter*, the court construed *Monroe* as providing only a limited bar to suit in a federal court against municipalities under the Civil Rights Act. To reach that result the court concluded that where a parent state no longer chose to clothe a municipality with immunity from liability for the Civil Rights Act violations of its employees, the scope of the Civil Rights Act should be adjusted accordingly. Relying upon 42 U.S.C. §1988 the court then stated:

> "The Supreme Court has construed §1988 to incorporate into the federal civil rights laws state rules of liability insofar as they serve the policies of the federal statutes more effectively than federal rules of liability. Sullivan v. Little Hunting Park, 396 U.S. 229, 240 (1969). If local law recognizes government liability where federal common law might not, then §1988 seems to provide that the local rule shall govern in an action under §1983.[36]

[36]"The Ninth Circuit has rejected the argument that municipal liability under §1983 is controlled by state law. Brown v. Town of Caliente, 392 F.2d 546 (9th Cir. 1968). In that case, however, it does not appear that the relevance of §1988 was argued." 447 F.2d at 369.

The court below, however, when presented with the above analysis from *Carter*, chose to reject it and rely, instead, upon its earlier decision in *Brown v. Town of Caliente*, 392 F.2d 546 (9th Cir. 1968). That reliance, though, is not responsive to the issue involved herein since *Brown* holds only that liability under 42 U.S.C.

raised herein (use of 28 U.S.C. §§1343(3) and (4) and 42 U.S.C. §1988 to impose a state created liability), certiorari should also be granted in this matter so that the entire scope of questions raised in this area by the conflicting decisions of the Circuit Courts of Appeals can be finally determined.

§1983 cannot be enlarged by state law, whereas the issue herein involves whether a federal court can impose a state created liability through utilization of 42 U.S.C. §1988. In response to that analysis, the court below stated:

> "Insofar as the *Carter* case would impose liability under section 1988 on municipalities other than the District of Columbia, *it is inconsistent with our decision in* Brown v. Town of Caliente *and we do not follow it.*" Appendix A, *infra* at 6. (Emphasis added.)

The Seventh Circuit Court of Appeals has purported to deal with the §1988 issue involved herein in *Ries v. Lynskey*, 452 F.2d 172 (7th Cir. 1971). However, while recognizing the above dichotomy of opinion between the *Brown* court and the *Carter* court on the scope of *Monroe*, the *Ries* court avoided the issue by resting its decision on an analysis similar to *Brown*, namely that state law could not enlarge the scope of §1983.

Thus, at the present time there is an apparent conflict between the court below and the D. C. Circuit Court of Appeals on the effect, if any, of *Monroe* on a federal court's ability to utilize §1988 to recognize and impose a state created liability upon a public entity for the federal Civil Rights Act violations of the entity's employees. On the merits of the issue, petitioners see no conflict in adhering to *Monroe's* holding that Congress did not intend to impose liability under 42 U.S.C. §1983 upon a municipality for the Civil Rights Act violations of its employees and the position they urge that a state has the absolute right to impose such liability if it chooses to do so and that a federal court has

the jurisdiction to impose that state created liability pursuant to 28 U.S.C. §§1343(3) and (4) because of 42 U.S.C. §1988. Under this analysis there is no enlargement of the liability scope of §1983.[8]

In pointing out the conflict in decisions discussed above, mention should be made of the fact that the *Carter* court did have an alternative basis for its holding, to-wit, the plenary power of Congress to impose liability upon the District of Columbia. Petitioners submit, however, that that alternative holding does not in any way diminish the fact that there is still this conflict in decisions of the Courts of Appeals on the scope of *Monroe*. Each court has clearly enunciated its view, and in an area as important as federal civil rights this conflict should not be allowed to remain.

The necessity for resolving this conflict can be seen from the fact that the trend among states is to abolish the doctrine of sovereign immunity and to make entities such as the County of Alameda financially responsible for the torts of their employees. As a result, the question of whether a federal court can use 42 U.S.C. §1988 to adopt these state laws for the protection of federal rights and thus obtain jurisdiction over a public entity by virtue of 28 U.S.C. §§1343(3) and (4) is a highly important question that is bound to continue to arise and create confusion until a definitive ruling is handed down by this Court. Since such definitive ruling must, of necessity, involve an interpretation of *Monroe*, only this Court can now make that ruling.

---

[8]While petitioners have not urged the expanded scope of §1983 analysis urged by the respondent in *Carter*, petitioners herein do support such analysis as an alternative approach. However, to avoid repetition, and because petitioners believe that the approach they suggest is more logically consistent with *Monroe*, petitioners will leave the expanded scope of §1983 analysis to the respondent in *Carter*.

One final point to be made on this issue is that the kind of analysis petitioners now urge this Court to make has been made, ironically, by the court below in *Hesselgesser v. Reilly*, 440 F.2d 901 (9th Cir. 1971). The only difference is that in *Hesselgesser* the court below, through §1988, looked to Washington law that imposed vicarious liability upon a sheriff for the Civil Rights Act violations of a deputy. While the *Hesselgesser* court gave no explanation of its basis for jurisdiction, which, in turn, caused the district court in these cases a certain amount of consternation (see Appendix F, *infra* at 28-30), it would seem that the court below had to rely for jurisdiction upon 28 U.S.C. §§1343(3) and (4) since it has categorically rejected the notion that a party can be joined on a pendent state claim when he has no involvement in the related federal claim. (See discussion in part II, *infra*.) Moreover, the effort of the court below to explain *Hesselgesser* by reference to §1983 liability concepts is irrelevant since only a state-created liability was being imposed.

II.

There Is a Conflict in Decisions of the Circuit Courts of Appeals on Whether United Mine Workers v. Gibbs, 383 U.S. 715 (1966), Allows a Federal Court the Power to Exercise Jurisdiction Over a Party on a Pendent State Law Claim When Such Party Is Not Involved in the Related Federal Claim.

The decision of the court below (Appendix A, *infra* at 1) holding that *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) does not allow a federal court the power to exercise jurisdiction over a party on a pendent state law claim when there is no viable federal claim involving that party is directly in conflict with numerous decisions of other Circuit Courts of Ap-

peals which have construed *Gibbs* on this issue. See, *e.g., Leather's Best, Inc. v. S. S. Mormaclynx,* 451 F. 2d 800 (2d Cir. 1971); *Astor-Honor, Inc. v. Grosset & Dunlap, Inc.,* 441 F.2d 627 (2d Cir. 1971); *Hatridge v. Aetna Cas. & Sur. Co.,* 415 F.2d 809 (8th Cir. 1969); *Stone v. Stone,* 405 F.2d 94 (4th Cir. 1968); *Connecticut Gen'l Life Ins. Co. v. Craton,* 405 F.2d 41 (5th Cir. 1968); *Jacobson v. Atlantic City Hosp.,* 392 F.2d 149 (3d Cir. 1968); *Wilson v. American Chain and Cable Co.,* 364 F.2d 558 (3rd Cir. 1966). Moreover, not only is this conflict expressly recognized by the Circuit Courts of Appeals, but it has produced decisions in which there is express criticism of each others' position.

Exemplifying this conflict and criticism are the following observations from the *Hatridge* and *Astor-Honor* opinions followed by the response of the court below. In *Hatridge,* which was written by Mr. Justice Blackmun prior to his appointment to this Court, the court stated:

> "The Ninth Circuit, however, has refused to follow the Third Circuit precedent and has rejected pendent jurisdiction over a consortium claim. Hymer v. Chai, 407 F.2d 136, 137-138 (9 Cir. 1969). The court felt that it was bound by its earlier decision in an [sic] non-consortium case. Takashi Kataoka v. May Dep't Stores Co., 115 F.2d 521 (9 Cir. 1940), cert. denied, 312 U.S. 700, 61 S.Ct. 739, 85 L.Ed. 1134. . . .
>
> "The Ninth Circuit decision hangs upon a case decided 29 years ago, long prior to *Gibbs* but subsequent to Hurn v. Oursler, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148 (1933), where the doctrine of pendent jurisdiction, although not re-

ferred to by that name, was given some vitality. . . .

"In any event, we find ourselves in sympathy with the Third Circuit approach for appropriate cases. *It makes good sense; it avoids forum shopping and multiple actions; it tends to reduce costs for litigants; and it avoids the waste of already heavily burdened judicial time.* We feel that a consortium suit, in the light of its stated character under Arkansas law, is ideal for the application of the doctrine. We apply pendent jurisdiction as a supportive ground for our conclusion here." 415 F.2d at 817. (Emphasis added.)

Similarly, in *Astor-Honor*, the court stated:

"There are indeed many statements supporting 'the general proposition' enunciated by the district court, notably, for our purposes, that in Wasserman v. Perugini, 173 F.2d 305, 306 (2 Cir. 1949), where this court declared that in the absence of diversity, a federal court did not have jurisdiction over individual defendants on a state tort claim arising from the same accident which was the basis of a separate count against the United States under the Federal Tort Claims Act. However, '[c]ases antedating [United Mine Workers (of America) v. Gibbs, 383 U.S. 715 [86 S.Ct. 1130, 16 L.Ed.2d 218] (1966),] that denied judicial power, i. e., jurisdiction, over the pendent claim are suspect as authority.' 3A Moore, Federal Practice ¶ 18.07[1.-4] (1970). The Gibbs Court described the proper test of pendent jurisdiction as follows, 383 U.S. at 725, 86 S.Ct. at 1138:

"'The statee and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordiinarily be expected to try them all in one judiicial proceeding, then, assuming substantiality cof the federal issues, there is *power* in federal ccourts to hear the whole. [Emphasis the court's.]]'

"*Although thee pendent claim in* Gibbs *did not include a parrty not named in the federal claim, Mr. Justice B3rennan's language and the common sense consideerations underlying it seem broad enough to cowver that problem also.* . . . The only post-*Gibbs* court of appeals decision that has been called to our attention which involved the joinder as defendants of persons not parties to the claim supporting fedleral jurisdiction is Williams v. United States, 405 F.2d 951, 955 (9 Cir. 1969). This presented the ssame problem as this court had faced, long before *Gibbs*, in Wasserman v. Perugini, *supra*, namelyy, the joinder of defendants as to whom there was no diversity with a claim for the same injury against the United States under the Federal Tort Claims Act. Although the *Williams* court approvedd the district court's dismissal of these defendants, *wee are not at all sure we would agree with this insofiar as the decision rested on a general theory of lackk of power.*" 441 F.2d at 629-630. (Emphasis addded.)

However, when presented with this trend of post-*Gibbs* decisions, thee court below chose not to follow them but, instead, to reiterate its position in *Hymer v. Chai*, 407 F.2d 1136 (9th Cir. 1969) on the absence

of power in a federal court to exercise jurisdiction over a party who was not involved in a related federal claim. While expressly noting the trend of post-*Gibbs* decisions cited above, the court below went on to state:

> "However, there are numerous decisions which have reached the opposite conclusion. Moreover, at least one authority has expressed the view that pendent jurisdiction should not be available to bring in a different party on a solely state claim merely because that claim is related to a federal claim against an existing party. Another has stated that it is by no means certain that pendent jurisdiction permits joinder of a party against whom no federal claims exist. Furthermore, *Hatridge v. Aetna Casualty & Surety Co.*, 415 F.2d 809 (8th Cir. 1969), a case critical of our decision in *Hymer* and strongly relied upon by appellant, has itself been criticized as having 'strained for jurisdiction.' (Appendix A, *infra* at 8-9.)
>
> "We are thus confronted with a question on which there is an apparent conflict, but on which this court has previously taken a stand in *Hymer*. Having found ample support for the position taken by this court in *Hymer* and having been shown no compelling reason to reverse that stand, we conclude that the court below properly relied on *Hymer* in refusing to exercise jurisdiction over the pendent state claims." (Appendix A, *infra* at 10.)

Having, thus, clearly reiterated its position in *Hymer*, that federal district courts in the Ninth Circuit do not have the power to consider whether to exercise jurisdiction on a pendent state claim over a party who is not

involved in the federal claim, the court below went on to intimate that the district court, as a matter of discretion, refused to exercise jurisdiction. Petitioners submit, however, that the court below erred in attributing to the district court a holding that it would not, as a matter of discretion, hear the state claims against the County when the district court specifically stated in its opinion that in view of *Hymer*, it "is devoid of the power to adjudicate the state claim against the County; *the issue is not one of discretion.*" (Appendix F, *infra* at 23.) (Emphasis added.)

While the district court intimated it might choose not to hear the state claims, assuming it had discretion to do so, such intimation in no way reflected the district court's final word on the matter. Indeed, the district court in footnote 5 of its order specifically stated that it was not expressing any opinion on what it would do if it were free of the influence of *Hymer*. (Appendix F, *infra* at 27-28.) Thus, to uphold the district court's decision on the ground that it exercised its discretion in refusing to take jurisdiction over the County is simply contrary to what the district court did and unfair to petitioners. At a minimum, if the lack of power concept in *Hymer* is to be reversed so that the district court might have the power to exercise its discretion, then the matter ought to be sent back to the district court for consideration in the light of that knowledge.

It should also be apparent that in spite of the allusion by the court below to an exercise of "discretion" by the district court, the fact still remains that as a result of the decision by the court below federal district courts in the Ninth Circuit are now without the power to exercise jurisdiction on a pendent state law

claim over a party who is not involved in a related federal claim.

In support of its decision, the court below claims to have found "ample support" in *Patrum v. City of Greensburg*, 419 F.2d 1300 (6th Cir. 1969), *cert. denied*, 397 U.S. 990 (1970) and *Wojtas v. Village of Niles*, 334 F.2d 797 (7th Cir. 1964), *cert. denied*, 379 U.S. 964 (1965). But, the fact is that neither can be said to support the lack of power concept. In *Patrum* the court expressly recognized the power of the district court to join the city and merely upheld the district court's exercise of discretion to refuse to join the City. As for *Wojtas*, it was decided before *Gibbs* and must be viewed accordingly. Thus, only the Ninth Circuit is contrary to the trend of post-*Gibbs* decisions in other circuits which expressly hold that pendent jurisdiction allows for the joinder of parties as well as claims.

Moreover, contrary to the observation of the court below that *Patrum* and *Wojtas* are the only two cases that involved the precise question raised herein, at least one federal district court has recently adopted petitioners' interpretation of *Patrum* and ruled that it did have the power to exercise jurisdiction over the City of Council Bluffs in a fact situation that is indistinguishable from the instant case. See *Eidschun v. Pierce*, 335 F. Supp. 603, 609-614 (S.D. Iowa 1971). Petitioners are, of course, of the view that the same kind of analysis that was made in *Eidschun* should be made herein. In addition, *Eidschun* points up that there is even a conflict in decisions on the precise question involved herein.[4]

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[4]The respondent in *Carter* assumes in his brief to this Court that even if he is wrong on the expanded scope argument of §1983, pendent jurisdiction would still be available to join the District of Columbia as a pendent party. See Brief for Respondent

In sum, the question of pendent parties is one of major importance to the entire scope of federal jurisdiction. The resolution of this issue involves an interpretation of this Court's holding in *United Mine Workers v. Gibbs, supra.* To date, the majority of the Circuit Courts of Appeals have interpreted *Gibbs* as allowing for the joinder of parties against whom there is no independent basis of federal jurisdiction, provided the considerations for the exercise of pendent jurisdiction are otherwise met. The Ninth Circuit Court of Appeals, however, stands in flat contradiction to this trend. Thus, only this Court can now resolve this conflict and insure that all persons have the same jurisdictional rights in all federal courts.

III.

The Ninth Circuit Court of Appeals' Refusal to Recognize Alameda County as a "Citizen" of California for Diversity Jurisdiction Purposes Is in Direct Conflict With Decisions of This Court and Other Courts of Appeals on This Same Kind of Issue.

To petitioners' knowledge the only decisions holding that a county is not a "citizen" of a state for diversity jurisdiction purposes emanate from the court below. Moreover, that holding seems to be limited to California counties since at least one district court within the Ninth Circuit has refused to follow the court below on this issue. See *White v. Umatilla County,* 247 F.Supp.

43, n. 40, in *District of Columbia v. Carter,* No. 71-564. If the respondent is correct concerning the power in the D. C. Circuit to join pendent parties, this fact further highlights the conflict among the circuits in this area of federal jurisdiction.

918 (D. Ore. 1965). In refusing to follow the court below, *White* stated:

> "A long line of federal decisions, including, but not limited to, Lincoln County v. Luning, 133 U.S. 529, 10 S.Ct. 363, 33 L.Ed. 766 (1890); Chicot County v. Sherwood, 148 U.S. 529, 13 S.Ct. 695, 37 L.Ed. 546 (1893); Great No. Life Ins. Co. v. Read, 322 U.S. 47, 64 S.Ct. 873, 88 L.Ed. 1121 (1944), and Pettibone, et al., v. Cook County, 120 F.2d 850 (8th Cir. 1941), hold that a county is not such an integral part of the state, as to be immune from jurisdiction under the diversity statute." *Id.* at 919-920.

To this same effect is the following statement by the Sixth Circuit Court of Appeals in *Brown v. Marshall County, Kentucky*, 394 F.2d 498, 500 (6th Cir. 1968):

> "Also without merit is the county's contention that it is not a 'citizen' of Kentucky for purposes of diversity of citizenship under 28 U.S.C. § 1332. In Cowles v. Mercer County, 74 U.S. (7 Wall.) 118, 19 L.Ed. 86, the Supreme Court held that for purposes of diversity jurisdiction a county is a citizen of the State in which it is located."

In the *Moor* case, the district court recognized this long line of federal authority, but concluded as follows:

> "While plaintiff's argument on this threshold point has substantial merit, this court is bound to recognize and adhere to the Ninth Circuit decisions which hold that California counties and other subdivisions of the State are not 'citizens' for diversity purposes. *Lowe v. Manhattan Beach*

City School District, 222 F.2d 258 (1955); *Miller v. County of Los Angeles*, 341 F.2d 964 (1965), 364 F.2d 500 (1966), *cert. denied* 386 U.S. 990 (1967). This court is fully cognizant of the fact that the substantial weight of authority is contra the position of the Ninth Circuit; moreover, this court is also aware of the possibility that the question of whether California counties are 'citizens' within the meaning of § 1332 may not have received from the Ninth Circuit the full attention and complete analysis which the question obviously deserves. See *White v. Umatilla County*, 247 F.Supp. 918 (D. Or. 1965). Nonetheless, this court is not free to disregard the reasonably clear conclusion of law contained in the above-cited cases. Re-examination of that conclusion is for the Ninth Circuit." (Appendix E, *infra* at 18-19.)

Yet, in spite of this long line of federal authority and the obvious concern by district courts within the Ninth Circuit as to whether the court below has fully considered the matter, the court below in Moor merely referred without analysis to its earlier opinion which held that a California county was not a "citizen" of California for diversity jurisdiction purposes.

In holding as it did, petitioners submit that the court below ignored the express mandate of this Court in *Kramer v. Caribbean Mills*, 394 U.S. 823, 829 (1969) that "[t]he existence of federal jurisdiction is a matter of federal, not state, law" and, thus, failed completely to give the question "the full attention and complete analysis which [it] obviously deserves." (Appendix E, *infra* at 19.) What the court below should have done is engage in an analysis of the nature

of the County and recognize that the mere fact that state law classifies the County as a "state agency" does not preclude a federal court from holding it to be a "citizen" of the state for diversity jurisdiction purposes. See, *e.g., Department of Highways of La. v. Morse Bros. & Assoc.*, 211 F.2d 140, 144-145 (5th Cir. 1954); *Morgan Dallas Corp. v. Orleans Parish School Board*, 302 F.Supp. 1208, 1209 (E.D. La. 1969); *George A. Fuller Company v. Coastal Plains, Inc.*, 290 F.Supp. 911, 915-916 (E.D. La. 1968); *Moss v. Calumet Paving Company*, 201 F.Supp. 426, 430-431 (S.D. Ind. 1962). Exemplifying the kind of analysis which must be made when a defendant claims it is an agency of the state are the following observations from *Morgan Dallas Corp.*:

> "Of course, the School Board is an agency of the State; its action is state action. But since it is also a body corporate, with power to sue and be sued (LSA-R.S. 17:51), to purchase and to hold property (LSA-R.S. 17:81), to sell property (LSA-R.S. 17:87.6), and to make contracts (LSA-R.S. 17:81, 83), it is considered a citizen separate from the state itself for purposes of diversity jurisdiction. Department of Highways of La. v. Morse Bros. and Assoc., 5 Cir. 1954, 211 F.2d 140; Belle Fontaine Towing Co. v. Dept. of Hys., State of La., E.D.La. 1967, 271 F.Supp. 60; George A. Fuller Company v. Coastal Plans, Inc., E.D.La. 1968, 290 F.Supp. 911; C. H. Leavell & Co. v. Board of Comm'rs & Dept. of Hys., State of La., E.D.La. 1969, memorandum opinion." 302 F.Supp. at 1209.

With respect to the issue involved herein, the most recent pronouncement by the California Supreme Court

on the nature of a California county can be found in *People ex rel. Younger v. County of El Dorado*, 5 Cal.3d 480, 491 n. 12 (1971). The court there stated:

> "Code of Civil Procedure section 1085 states that the writ may be issued to any 'inferior tribunal, corporation, board or person.' While it has been said that counties are not municipal corporations but are political subdivisions of the state for purposes of government (*County of Marin v. Superior Court* (1960) 53 Cal.2d 633, 638-639 [2 Cal.Rptr. 758, 349 P.2d 526]; *County of Los Angeles v. Riley* (1936) 6 Cal.2d 625, 627-628 [59 P. 2d 139, 106 A.L.R. 903]; *County of San Mateo v. Coburn* (1900) 130 Cal. 631, 636-637 [63 P. 78, 621]; *Pitchess v. Superior Court* (1969) 2 Cal.App.3d 653, 656-657 [83 Cal. Rptr. 41]), counties have also been declared public corporations or quasi-corporations. (*Pitchess v. Superior Court, supra; Whelan v. Bailey* (1934) 1 Cal.App.2d 334, 339 [36 P.2d 709], overruled on other grounds in *Estate of Miller* (1936) 5 Cal.2d 588, 591 [55 P.2d 491]; *Smith v. Myers* (1860) 15 Cal. 33, 34; 1 McQuillin, Municipal Corporations (3d ed.) §2.46, pp. 496-497.) In view of Government Code section 23003, which provides that a county is 'a body corporate and public,' and section 23004, subdivision (a) of the same code, which states that counties may sue and be sued, we think that a county is sufficiently corporate in character to justify the issuance of a writ of mandate to it."

Given this "corporate" status of a California county, and the fact that it has, under California law, the

power to sue and be sued (§§945 and 23004(a) of the California Government Code), as well as the powers to "[p]urchase, receive by gift or bequest, and hold land within its limits, or elsewhere when permitted by law" (§23004(b) of the California Government Code), to "[m]ake contracts and purchase and hold personal property necessary to the exercise of its powers" (§23004(c) of the California Government Code) and to "[m]anage, sell, lease, or otherwise dispose of its property . . ." (§23004(d) of the California Government Code), logic and federal law compel the conclusion that a California county should be considered a "citizen" separate from the state for diversity jurisdiction purposes. Indeed, California law fully recognized this distinction between the state as an entity and a county as an entity when it enacted §23011 of the Government Code:

> "The name of a county designated in this chapter is its corporate name, and it shall be designated thereby in any action or proceeding touching its corporate rights, property, and duties."

In view of the above, as well as the overwhelming body of federal law that holds counties to be "citizens" of their states for diversity jurisdiction purposes, there can be no justification for continuing the fiction that a California county is, in reality, the State. California counties are considered to be separate viable entities having numerous rights and duties like any other person or corporation, and under recent California case authority are even deemed to be corporate in character. They should, therefore, be deemed to be "citizens" for diversity jurisdiction purposes.

IV.

Conclusion.

This petition involves three primary questions of federal jurisdiction upon which, for each question, there is a conflict in decisions among the Circuit Courts of Appeals. Moreover, this conflict is neither subtle nor unknown, but has reached the point where the Circuit Courts of Appeals have become expressly critical of each others' views. The result is that plaintiffs in different parts of the country now find themselves with differing federal jurisdictional rights, not only in the area of federal Civil Rights Act cases, but also with respect to every conceivable kind of case which can be brought in a federal court.

Additionally, the importance of the issues raised in this petition is, perhaps, best exemplified by the fact that legal scholars throughout the country have indicated a desire to write about them. See Appendices I and J attached hereto, *infra* at 33 and 34 respectively.

Given these conflicts, therefore, which go to the very heart of an area as important as federal jurisdiction, and the fact that the conflicts result in large part from a difference of opinion on what certain decisions of this Court mean, only this Court can resolve the conflicts and insure that concepts of federal jurisdiction will be uniform throughout the Circuits.

For these reasons petitioners respectfully request that this petition for a writ of certiorari be granted.

Dated: June 27, 1972.

Respectfully submitted,

RONALD M. GREENBERG,
Counsel for Petitioners.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals, for the Ninth Circuit.

David Moor, Plaintiff-Appellant, vs. Frank I. Madigan; Glen Dyer; Thomas L. Houchens; Louis Santucci; Lawrence L. Riche; and County of Alameda, Defendants-Appellees. No. 71-3019.

William Donovan Rundle, Jr., a minor, by William D. Rundle, his guardian ad litem; William D. Rundle and Sarah Rundle, Plaintiff-Appellant, vs. Frank I. Madigan; Glen Dyer; Thomas L. Houchens; Louis Santucci; Lawrence L. Riche; and County of Alameda, Defendant-Appellee. No. 71-3020.

Filed: April 12, 1972.

On Appeal from the United States District Court for the Northern District of California.

Before: HAMLIN, MERRILL and DUNIWAY, Circuit Judges.

HAMLIN, Circuit Judge:

These are appeals from an order of the United States District Court for the Northern District of California dismissing appellants' claims against the County of Alameda (hereinafter County).

The claims arose out of the May, 1969, "People's Park" disturbance or riot, in which appellants were allegedly injured by an Alameda County deputy sheriff who was performing duties at that time and place on behalf of the County.

On February 12, 1970, appellants brought actions against several deputies, the sheriff, and the County. The complaints against the County alleged federal causes of action under the Civil Rights Act, 42 U.S.C. sections 1981-1988, and pendent state claims under sections 810 *et seq.* of the California Government Code (hereinafter Tort Claims Act). Both federal and state causes of action were premised on the theory that the county could be held vicariously liable for the acts of the deputies.

Both appellants alleged jurisdiction in the district court pursuant to 28 U.S.C. section 1343. Appellant Moor also alleged diversity jurisdiction under 28 U.S.C. section 1332.

The County subsequently filed motions to dismiss the claims against it in each case, contending that, as to the Civil Rights Act claims, the County was not a "person" who could be sued under the Act. The County also argued that, as the federal claims were not viable, the pendent state claims must also be dismissed. In addition, in the *Moor* case, the County separately moved to dismiss for lack of diversity, contending in part that the County was not a "citizen" for federal diversity jurisdiction purposes.

The trial court ultimately granted all of these motions and ordered that all claims against the County be dismissed. These appeals are taken from that order.

Three broad issues are thus presented by appellants. First, they argue that their Civil Rights Act claims against the County are viable, notwithstanding the fact that the County is not a "person" within section 1983 of the Act. Second, they contend that even if they did not present a cognizable federal cause

of action against the County, the district court should have retained jurisdiction of the pendent state claims against the County. Finally, appellant Moor argues that the County is a "citizen" for federal diversity jurisdiction purposes.

I. *The Civil Rights Act claims.*

In *Monroe v. Pape*, 365 U.S. 167 (1961), the Supreme Court, faced with a Civil Rights Act action against the City of Chicago stemming from the acts of certain of its police officers, held that muncipalities are not "persons" within the meaning of 42 U.S.C. section 1983,[1] and were thus excluded from its coverage.

Appellants state that they are not taking issue with that holding.

Instead, they contend that the *Monroe* holding should be limited to mean only that congressional enactment of section 1983 did not purport to impose vicarious liability on municipalities through federal law when no such liability existed under state law. From this position, they reason that when state law provides for the imposition of such liability, a federal court may properly entertain claims brought thereunder.

Appellants further contend that enforcement of these state-created rights in federal court can be effected

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[1] 42 U.S.C. section 1983, in pertinent part, reads:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

pursuant to the mandate of 42 U.S.C section 1988,[2] which permits the adoption of state law in order to make the Civil Rights Act fully effective.

Thus they claim that, as California permits the imposition of vicarious liability against a municipality,[3] and as they are seeking enforcement of this liability under section 1988, not section 1983, the holding in *Monroe v. Pape* is inapposite.

We do not agree.

In *Brown v. Town of Caliente*, 392 F.2d 546 (9th Cir. 1968), this court considered the argument that abolition of sovereign immunity in Nevada would allow the court to entertain a section 1983 action against a Nevada municipality. In rejecting that argument, the court noted:

> The Supreme Court having considered the Civil Rights Act, and having held municipalities were not liable under it, we cannot see how any action

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[2]42 U.S.C. section 1988, in pertinent part, provides:

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State . . ., so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, . . ."

[3]There appears to be some question as to whether or not California law would impose vicarious municipal liability on the facts of this case. However, as we conclude that these claims are not maintainable in federal court, we do not reach the issue.

> by the state of Nevada, either by its courts or by the legislature, . . . by abolishing sovereign immunity in Nevada, can bring about a different reading or different result to *Monroe v. Pape*. . . . 392 F.2d at 548.

However, appellants urge that *Brown*, like *Monroe*, is not applicable to their appeals, because the *Brown* court had not considered the relevancy of section 1988.

In support of this view, appellants rely heavily on *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971). *Carter*, in pertinent part, involved a section 1983 suit against the District of Columbia, resulting from the acts of certain of its police officers. In discussing *Monroe v. Pape* as a potential bar to the suit, the *Carter* court concluded that *Monroe* presented only a limited bar, and was not applicable to the extent that local law now permitted such suits.

The *Carter* court similarly relied on the language of section 1988 to support this conclusion, and also similarly implied that the *Brown* court might have reached a different result, had section 1988 been considered.[4]

Appellants' reliance on *Carter* is, however, misplaced. The *Carter* court specifically rested its conclusion on a second independent ground, that Congress had plenary power to impose liability on the District of Columbia; thus the factors that caused the *Monroe* court to hold the Civil Rights Act inapplicable

[4] 447 F.2d at 369 n.36.

to ordinary municipalities had no application to suits against the District. Insofar as the *Carter* case would impose liability under section 1988 on municipalities other than the District of Columbia, it is inconsistent with our decision in *Brown v. Town of Caliente* and we do not follow it.[4b]

Appellants have also contended that this court has previously endorsed the view that state law may be applied under section 1988 in *Hesselgesser v. Reilly*, 440 F.2d 901 (9th Cir. 1971).

While it is true that in *Hesselgesser* this court did apply state law to hold a sheriff vicariously liable for the civil rights violations of his deputies, that holding has no impact on our finding that *Monroe v. Pape* and *Brown v. Town of Caliente* control this appeal. *Hesselgesser* held only that state law could be applied pursuant to section 1988 "under appropriate circumstances." 440 F.2d at 903. Clearly, the sheriff held liable in *Hesselgesser* was a "person" within the meaning of the Civil Rights Act, as defined by *Monroe*. Thus, imposition of liability upon the sheriff was appropriate and in no way conflicts with the *Monroe* holding.

These appeals, however, present a totally different situation. Were appellants allowed to enforce the state-created municipal liability in the district court under section 1988, they would achieve a result which could not be reached through section 1983, under *Monroe* and

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[4b]At least one other federal court has examined the *Carter* opinion and also concluded that its reliance on the peculiar status of the District of Columbia considerably weakens the persuasive effect of the opinion, and rejected its application to a case involving an ordinary municipality. *See Ries v. Lynskey*, 452 F.2d 172, 175 (7th Cir. 1971).

Brown. This alone precludes application of section 1988, for the section, by its own terms, cannot be applied when the result would be inconsistent with the laws of the United States. *See Wilcher v. Gain*, 311 F.Supp. 754 at 755 (N.D. Cal. 1970).

Finally, we note that section 1988 has not been construed as having created a separate basis for prosecuting claims under the Civil Rights Act, but rather as pertaining to the "forms of process and the scope of remedy." *Pierre v. Jordan*, 333 F.2d 951, 958 (9th Cir. 1964) *cert. denied* 379 U.S. 974 (1965), *rehearing denied*, 380 U.S. 927 (1965). *Cf. Johnson v. New York State Ed. Dept.*, 319 F.Supp. 271, 276 (E.D. N.Y. 1970). Thus, it provides for the adoption of state law to cure remedial deficiencies in the federal act, but does not create any right of action in and of itself.[5]

We therefore hold that the district court properly dismissed the Civil Rights Act complaints against Alameda County.

II. *Pendent Jurisdiction over state claims.*

Appellants here contend that, even assuming they have not presented a cognizable federal claim under the Civil Rights Act, the trial court should have nevertheless retained jurisdiction to decide their pendent state claims.

We do not agree.

In dismissing the pendent state claims, the trial court relied primarily on our decision in *Hymer v. Chai*,

[5]This is consistent with the construction of section 1988 which was made in *Sullivan v. Little Hunting Park*, 396 U.S. 229, 240 (1969), wherein the Supreme Court sanctioned application of state law under section 1988 to make a damage determination. *See also* the dissent of Justice Harlan, *Id.* at 256-57.

407 F.2d 136 (9th Cir. 1969), in which this court held that pendent jurisdiction is available only to join claims, not parties. As the court below held that there was no viable federal claim against the County, it therefore concluded that the non-federal pendent claims could not be used to join the County in the action.

Appellants concede that *Hymer* was binding upon the district court. However, they argue that *Hymer* is questionable as a valid proposition of law, and contend that it is inconsistent with the general liberalization of the doctrine of pendent jurisdiction announced in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

In support of this view, appellants have cited cases in which courts have permitted assertion of federal jurisdiction over additional parties who were not involved in the federal claim and whose sole connection with the case stemmed from the pendent state law claim.[6]

However, there are numerous decisions which have reached the opposite conclusion.[7] Moreoever, at least one authority has expressed the view that pendent jurisdiction should not be available to bring in a different party on a solely state claim merely because

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[6] *See Hatridge v. Aetna Cas. & Sur. Co.*, 415 F.2d 809 (8th Cir. 1969); *Connecticut Gen'l Life Ins. Co. v. Craton*, 405 F.2d 41 (5th Cir. 1968); *Jacobson v. Atlantic City Hosp.*, 392 F.2d 149 (3rd Cir. 1968); *Wilson v. American Chain and Cable Co.*, 364 F.2d 558 (3rd Cir. 1966); *Stone v. Stone*, 405 F.2d 94 (4th Cir. 1968). *See also, Astor-Honor, Inc. v. Grosset & Dunlap, Inc.*, 441 F.2d 627 (2d Cir. 1971).

[7] *Williams v. United States*, 405 F.2d 951 (9th Cir. 1969); *Wojtas v. Village of Niles*, 334 F.2d 797 (7th Cir. 1964; *cert. denied*, 379 U.S. 964 (1965); *Barrows v. Faulkner*, 327 F.Supp. 1190 (N.D. Okla. 1971); *Hall v. Pacific Maritime Assn.*, 281 F.Supp. 54 (N.D.Cal. 1968).

that claim is related to a federal claim against an existing party.[8] Another has stated that it is by no means certain that pendent jurisdiction permits joinder of a party against whom no federal claims exist.[9] Furthermore, *Hatridge v. Aetna Casualty & Surety Co.*, 415 F.2d 809 (8th Cir. 1969), a case critical of our decision in *Hymer* and strongly relied upon by appellant, has itself been criticized having "strained for jurisdiction."[10]

Aside from this obvious lack of judicial unanimity on the view propounded by appellant, it appears that only two decisions have decided the precise question involved herein, namely, whether a Civil Rights Act action against municipal employees will permit a federal court to join the municipality itself as a party solely on the basis of pendent state claims. Both have rejected the argument.

In *Patrum v. City of Greensburg*, 419 F.2d 1300 (6th Cir. 1969), *cert. denied* 397 U.S. 990 (1970), the court upheld the trial court's refusal to exercise pendent jurisdiction over state claims against the City of Greensburg in a section 1983 action against one of its policemen. Similarly, in *Wojtas v. Village of Niles*, 334 F.2d 797 (7th Cir. 1964), *cert. denied*, 379 U.S. 964 (1965), the court held that state claims against a city could not be pendent to a section 1983 claim against one of its police officers.

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[8]Wright, *Federal Courts* 65 (2d ed. 1970).
[9]3A *Moore's Federal Practice* (Supp.) ¶ 18.07 (1.-4).
[10]*Id.* ¶ 18.07 (1.-2) n. 28.

We are thus confronted with a question on which there is an apparent conflict, but on which this court has previously taken a stand in *Hymer*. Having found ample support for the position taken by this court in *Hymer* and having been shown no compelling reason to reverse that stand,[11] we conclude that the court below properly relied on *Hymer* in refusing to exercise jurisdiction over the pendent state claims.

Furthermore, it appears that the district court's decision not to entertain the pendent state claims was correct, aside from the impact of *Hymer*.

Gibbs makes it clear that exercise of this pendent jurisdiction is discretionary in any case, and involves "considerations of judicial economy, convenience and fairness to litigants . . . ." 383 U.S. at 726. It is clear from the order of the district court[12] that it felt the instant case would be based on the California Tort Claims Act, involve special defenses available to the County, and call for the resolution of difficult questions of California law, upon which there was a dearth of authority.

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[11]Appellants have raised the contention that *Hesselgesser, supra*, by utilizing state law under section 1988 to impose vicarious liability on the county sheriff, and thereby bring him into the action solely on the basis of state claims, has impliedly overruled *Hymer*. An examination of the *Hesselgesser* opinion fails to disclose any such intent, nor, indeed, any mention of *Hymer* at all. We reject the argument.

[12]In footnote 5 of the opinion, the district court stated, in part:

> "Moreover, on the issue of the court's *discretion* to adjudicate the pendent claim, there would still be substantial doubts as to whether the state claim should be heard."

Thus, the district court also felt that as a purely discretionary matter the federal court was an inappropriate forum to hear these state claims.[13] We agree.

For the foregoing reasons, we hold that the trial court properly dismissed appellants' pendent state claims against the County of Alameda.

III. *The County as a "citizen" for diversity purposes.*

In the *Moor* case a separate basis for jurisdiction, diversity of citizenship, was also alleged. The trial judge dismissed claims presented under this jurisdictional basis, noting our prior holding in *Miller v. County of Los Angeles*, 341 F.2d 964 (9th Cir. 1964), in which this court held that a California county is not a citizen for federal diversity purposes.

Appellant Moor contends that we should reconsider this position in light of authority holding that a county is a "citizen" for diversity purposes.[14]

Our position had its inception in *Lowe v. Manhattan Beach City School Dist.*, 222 F.2d 258 (9th Cir. 1955) in which this court held that a school district was not a citizen for diversity purposes. The reasoning of that opinion was subsequently applied to a suit

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[13]Appellants contend that the County, by appearing to generally contest the action, had waived any right to later contest the jurisdictional issue. The short answer to this is contained in *Gibbs*, in which the Supreme Court stated that pendent state claims might appropriately be dismissed at any time. 383 U.S. at 726-27.

[14]*Brown v. Marshall Cty.*, 394 F.2d 498 (6th Cir. 1968); *Pettibone v. Cty.*, 120 F.2d 850 (8th Cir. 1941); *Harris Cty. v. Ideal Cement Co.*, 290 F.Supp. 956 (S.D. Tex. 1968).

against a California county, in *Miller*. That holding is still the law in the Ninth Circuit. *Cf. Fifty Associates v. Prudential Insurance Co.*, 446 F. 2d 1187, 1191 (9th Cir. 1970).

The opinion in *Fifty Associates* makes it clear that we are by no means alone in holding that a state agency may not be a party to a diversity action. *See* 446 F.2d at 1191 and cases cited therein.

We therefore hold that the district court properly rejected appellant Moor's allegation of diversity of citizenship and correctly dismissed claims brought thereunder. As we have previously concluded that appellants' allegations of jurisdiction under the Civil Rights Act and the doctrine of pendent jurisdiction were also properly rejected by the district court, we therefore hold the decision of the court dismissing all claims against the County of Alameda was correct, and must be affirmed.

Affirmed.

APPENDIX B.

Order.

United States Court of Appeals, for the Ninth Circuit.

David Moor, Plaintiff-Appellant, v. Frank I. Madigan, Glen Dyer; Thomas L. Houchens; Louis Santucci; Lawrence L. Riche; and County of Alameda, Defendants-Appellees. No. 71-3019.

William Donovan Rundle, Jr., a minor, by William D. Rundle, his guardian ad litem; William D. Rundle and Sarah Rundle, Plaintiff-Appellant, v. Frank I. Madigan; Glen Dyer; Thomas L. Houchens; Louis Santucci; Lawrence L. Riche; and County of Alameda, Defendant-Appellee. No. 71-3020.

Filed: May 30, 1972.

On Petition for Rehearing and for Rehearing In Banc Before: HAMLIN, MERRILL and DUNIWAY, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

For the Court:

Oliver B. Hamlin, Jr.
Circuit Judge

APPENDIX C.

Order.

United States Court of Appeals, for the Ninth Circuit.

David Moor (71-3019), William D. Rundle, Jr., etc. (71-3020), Plaintiffs-Appellants, v. Frank I. Madigan, et al., Defendants-Appellees, Nos. 71-3019, 71-3020.

Filed: Jan. 24, 1972.

Before: DUNIWAY and HUFSTEDLER, Circuit Judges

Appellants' motion to consolidate the appeals in *Moor v. Madigan*, No. 71-3019, and *Rundle v. Madigan*, No. 71-3020, is granted.

The appeals are ordered expedited. Appellants' opening brief shall be filed not later than February 9, 1972; appellees' brief shall be filed not later than February 23, 1972; appellants' reply brief, if any, shall be filed not later than March 3, 1972. Oral argument will be set for the week of March 6, 1972, in San Francisco on a date hereafter to be fixed.

B. C. Duniway
Shirley Hufstedler

APPENDIX D.

Order.

In the United States District Court, Northern District of California.

Robert Scheer, Plaintiff, v. Frank Madigan, et al., Defendants. No. C-70 155 RFP.

William Donovan Rundle, Jr., et al., Plaintiffs, v. Frank I. Madigan, et al., Defendants. No. C-70 334 RFP.

David Moor, Plaintiff, v. Frank I. Madigan, et al., Defendants. No. C-70 333 RFP.

In these civil rights cases, written and oral argument has been tendered to the court on plaintiffs' discovery motions to compel further answers to interrogatories and on defendants' motion to dismiss the complaint as to the County of Alameda. The court makes its order as follows:

. . .

VI. MOTIONS TO DISMISS

Rundle v. Madigan: County of Alameda's motion to dismiss is granted. The contentions raised in opposition have already been passed upon by the court in the related case of *Scheer v. Madigan,* and the court sees no reason to deviate from that ruling.

Moor v. Madigan: In opposition to this motion, plaintiff presents interesting arguments based on a diversity of jurisdiction theory. The thrust of plaintiff's argument is that Cal. Government Code § 815.2 gives

plaintiff a state cause of action against the County of Alameda, and that plaintiff can choose to litigate this cause of action in a federal forum on a diversity of jurisdiction basis just like any other state action. Defendant's brief is not responsive to this argument, and the court, not having considered these contentions before, would benefit from a counter presentation. Accordingly, defendant is hereby instructed to file a brief responsive to plaintiff's diversity argument within fifteen days of receipt of this order. Plaintiff may reply, within ten days of receipt of defendant's papers.

One specific point on which the court seeks advice of counsel is whether *Monroe v. Pape*, 365 U.S. 167 (1961), would preclude the recognition of a cause of action against the county under § 815.2 where the underlying liability of the county employee is predicated upon a violation of the Civil Rights Act. That is, would the recognition of such a *state* cause of action run fatally counter to *Monroe* and to the position of the Ninth Circuit (e.g., *Brown v. Town of Caliente*, 392 F.2d 546 (1968)); by achieving indirectly what these courts have held cannot be done directly?

Another specific inquiry involved here is whether, as a matter of state law, § 815.2 affords a cause of action against the county where the underlying tort of the employee was intentional.

Because briefing on these and related questions will prove helpful, the submission of this aspect of the motion to dismiss is vacated. A ruling on the motion to

dismiss in this case will await the further written argument.

Of course, no further briefing is required on the §§ 1981 and 1988 grounds urged in opposition to this motion. These contentions have been considered and rejected in *Scheer* and *Rundle*, and are also rejected here.

Accordingly, the motion to dismiss in *Rundle v. Madigan* is GRANTED, and the motion to compel further answers is ruled upon as hereinbefore indicated.

SO ORDERED.

DATED: March 31, 1971.

/s/ Robert F. Peckham
United States District Judge

APPENDIX E.

Order Affirming Prior Order Granting Defendant County of Alameda's Motion to Dismiss.

In the United States District Court, Northern District of California.

David Moor, Plaintiff, v. Frank I. Madigan, et al., Defendants. No. C-70 333 RFP.

* * *

This case is a companion case to *Rundle v. Madigan*, C-70 334, in which this court held that the doctrine of pendent jurisdiction was not available to enable plaintiff to sue the County of Alameda in this court absent an independent basis of federal subject matter jurisdiction as to the County itself. This court considered itself bound by the case of *Hymer v. Chai*, 407 F.2d 136 (Ninth Cir. 1969) in concluding that pendent jurisdiction was not available to bring in additional parties. For the reasons stated in the *Rundle* Memorandum and Order, any similar pendent jurisdiction arguments tendered in this case are also rejected.

In this case only,[1] however, plaintiff argues that an independent federal jurisdictional basis does exist as to the County, viz., diversity of citizenship. See 28 U.S.C. § 1332. If such jurisdiction does exist, it is because the defendant County is a "citizen" for diversity purposes. While plaintiff's argument on this threshold point has substantial merit, this court is bound to recognize and adhere to the Ninth Circuit decisions

[1]Plaintiff Moor alleges that he is a citizen of the State of Illinois; plaintiff Rundle is a citizen of the State of California.

which hold that California counties and other subdivisions of the State are not "citizens" for diversity purposes. *Lowe v. Manhattan Beach City School District*, 222 F.2d 258 (1955); *Miller v. County of Los Angeles*, 341 F.2d 964 (1965), 364 F.2d 500 (1966), *cert. denied* 386 U.S. 990 (1967). This court is fully cognizant of the fact that the substantial weight of authority is contra the position of the Ninth Circuit; moreover, this court is also aware of the possibility that the question of whether California counties are "citizens" within the meaning of § 1332 may not have received from the Ninth Circuit the full attention and complete analysis which the question obviously deserves. See *White v. Umatilla County*, 247 F.Supp. 918 (D. Or. 1965). Nonetheless, this court is not free to disregard the reasonably clear conclusion of law contained in the above-cited cases. Re-examination of that conclusion is for the Ninth Circuit.

Diversity of citizenship is a basis of subject matter jurisdiction. Such jurisdiction is not waivable by the parties, and may be examined at any time. Plaintiff's arguments based upon a waiver by the County, if intended to merit consideration with regard to subject matter jurisdiction, are therefore misplaced and inapposite. Insofar as the waiver argument is raised in connection with the pendent jurisdiction theory, decision on the purported waiver is unnecessary in light of the court's holding that pendent jurisdiction is unavailable in the circumstances of this case.

Accordingly, this court's order granting the County of Alameda's motion to dismiss as to plaintiff's First and Second Causes of Action is affirmed.

The court's rulings herein also make it clear that no jurisdiction resides in this court to adjudicate plaintiff's Third and Fourth Causes of Action as to County defendant. Accordingly, the County is ordered dismissed from those remaining causes of action as well, and plaintiff's motion is denied.

So ordered.

Dated: Aug. 25, 1971.

/s/ Robert F. Peckham
United States District Judge

APPENDIX F.

Memorandum and Order Affirming Prior Orders Granting Defendant County of Alameda's Motions to Dismiss.

In the United States District Court, Northern District of California.

William Donovan Rundle, Jr., etc., et al., Plaintiffs, v. Frank I. Madigan, et al., Defendants. No. C-70 334 RFP.

* * *

This case is one of several related civil rights actions stemming from what has become known as the "People's Park" controversy. Plaintiff claims that his federal civil rights were violated by a conspiracy among the defendants—the Sheriff and various deputies of Alameda County—to utilize unlawful force in suppressing an assembly of persons in the streets of Berkeley, California, on May 15, 1969, and by the unlawful shot-gun shooting of plaintiff on that day. Claims based upon state law are also asserted.

In an earlier order, this court granted the defendant County of Alameda's motion to dismiss on the ground that it was not amenable to suit under the Civil Rights Act since it was not a "person" within the meaning of that Act. 42 U.S.C. § 1983. This was undoubtedly a correct statement of the law, *Monroe v. Pape*, 365 U.S. 167 (1961), and plaintiff does not presently dispute this.

The Court also ordered that the state claims be dismissed as to the County. It is this latter order which plaintiff now seeks to reverse.

The basis for this motion for reconsideration is that the state claims against the County should be retained in this action on the theory of pendent jurisdiction. More precisely, plaintiff argues that this court need not have an independent basis of federal subject matter jurisdiction as to the County, provided that the court has subject matter jurisdiction as to the other defendants, and provided further that the facts which underlie the state cause of action against the County are essentially the same as those which underlie the federal cause of action against the other defendants. Plaintiff further argues that the County has waived any objections to the assertion of personal jurisdiction over it; that in fact a good state cause of action can be predicated against the County on the basis of the California Tort Claims Act (Cal. Gov't. Code § 815.2); and that nothing in the Civil Rights Act or *Monroe v. Pape*, 365 U.S. 167 (1961), precludes this court from recognizing a state cause of action against a County where the underlying liability of the county is based upon a Civil Rights Act violation by a county employee.

The defendant County basically and simply argues that the doctrine of pendent jurisdiction is not applicable unless the federal claim and the state claim are asserted against the same party. That is, the doctrine cannot be employed to bring in additional parties as to which the court does not have an independent basis of federal subject matter jurisdiction.

While plaintiff has skillfully briefed many interesting arguments, the court concludes that at least within the Ninth Circuit, the defendant County is correct that pendent jurisdiction is not available in the circumstances

of this case. Accordingly, the court does not reach plaintiff's other contentions.

The controlling point is that in the Ninth Circuit pendent jurisdiction is available only to join claims, not to join parties. *Hymer v. Chai*, 407 F.2d 136 (1969). That is, the concept applies "only where the same parties are involved on the state and federal claims." Wright, *Federal Courts* (2nd Ed. 1970), at 65. Since there is no federal claim alleged against the County, no state claim against the County is within the pendent jurisdiction of this court, no matter how closely related factually that state claim may be to a federal claim against another defendant. On this view of the doctrine—viz. that the doctrine is simply not available—this court is devoid of the power to adjudicate the state claim against the County; the issue is not one of discretion. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-26 (1966).

In *Hymer v. Chai, supra,* a husband and wife brought a personal injury diversity action in the United States District Court for Hawaii. The husband sought $75,000 damages for personal injuries and property damage, while the wife sued for loss of consortium. The wife claimed only $7,500, an amount below the monetary minimum necessary to sustain federal diversity jurisdiction (28 U.S.C. § 1332(a)). Diversity of citizenship was the only possible basis for federal jurisdiction.

The Ninth Circuit ruled that the District Court had erroneously assumed jurisdiction of the wife's cause of action, since that cause of action was not independently federally cognizable, and since joinder of an additional party was not the object of the doctrine of pendent jurisdiction.

Plaintiff seeks to avoid the impact of *Hymer* by arguing that Hymer is distinguishable from the present case and that, in any event, *Hymer* is questionable as a valid proposition of law. Dealing with the latter point first, it is true that *Hymer* relied heavily on a case which long ante-dated the *Gibbs* decision, viz. *Kataoka v. May Dep't. Stores Co.*, 115 F.2d 521 (Ninth Cir. 1940). It is also true that other circuits have permitted the application of pendent jurisdiction in factual situations essentially indistinguishable from that of *Hymer*. See *Stone v. Stone*, 405 F.2d 94 (Fourth Cir. 1968); *Jacobsen v. Atlantic City Hospital*, 392 F.2d 149 (Third Cir. 1968); *Hatridge v. Aetna Casualty & Surety Co.*, 415 F.2d 809 (Eighth Cir. 1969). The short and authoritative answer to plaintiff's latter contention is that whether or not the Ninth Circuit's position in *Hymer v. Chai* represents a dying view, that position was firmly stated and is binding on this court.

Whether *Hymer* is significantly distinguishable from the present case, however, is a question to which this court may properly address itself. In *Hymer* the court refused to allow the joinder of an additional party plaintiff who could not assert a federally cognizable claim against the defendant. In this case, however, the issue is whether to allow the joinder of a defendant against whom the plaintiff cannot state a federally cognizable claim. Further, in *Hymer* the jurisdiction of the court was based upon diversity of citizenship, whereas in this case, the court's jurisdiction rests upon a federal question.

This court's first response to this argument is that in an analysis of pendent jurisdiction, it is not particularly relevant to inquire whether the assertion of

pendent jurisdiction will enable an additional plaintiff or defendant to be joined. The basic inquiry in this regard is whether the doctrine may be employed to allow the joinder of any party who could not otherwise be in a federal court. And on this point, *Hymer v. Chai* speaks quite directly: "Joinder of claims, not joinder of parties, is the object of the doctrine." 407 F.2d at 137.

If, however, it is relevant to inquire whether a plaintiff or defendant will be the party joined, the joinder of a plaintiff is the more permissible and acceptable result, since this does not force an unwilling party into a federal forum, as is the case where an additional defendant is joined. To put the matter another way, if in *Hymer v. Chai* the wife had been permitted to assert her claim for loss of consortium, no great hardship would have been placed upon the defendant, since the defendant was already in the federal forum. Here, however, the state claims would serve to bring into federal court a defendant who would not otherwise be there. Thus, since the court in *Hymer* did not allow the doctrine of pendent jurisdiction to operate where its effect would have been to join an additional plaintiff, *Hymer v. Chai* counsels strongly against employing the doctrine where an additional defendant would be joined.[1]

As noted, another difference between *Hymer* and the present case is that *Hymer* was a diversity case whereas this one is a federal question case. On this point, the Fourth Circuit has stated that both instances should be treated similarly because "[i]n each situation, the federal court has before it a claim which clearly satisfies the requirements of § 1331 or § 1332,

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[1]See Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 Harv. L.Rev. 657, 664 (1968).

and in each instance the plaintiff asserts an additional claim which, if litigated alone, would not satisfy a jurisdictional requirement." *Stone v. Stone*, 405 F.2d 94, 97 (1968). If this position is accepted, then *Hymer v. Chai* would be apposite in the present case and would defeat plaintiff's motion.

If, however, federal question and diversity cases are to be treated differently, then a stronger case can probably be made for the application of the pendent jurisdiction doctrine, (where its effect is to bring in an additional party), in the diversity context than in the federal question context. Significantly, in those cases where this question has been considered, "pendent parties"[2] have recently been permitted in the diversity cases, but disallowed in the federal question cases.[3] One factor apparently underlying this differential treatment is that in a diversity situation, the claims are all based upon state law, and so one would expect them to be litigated together. In the federal question case, however, if the federal jurisdiction is exclusive, then one would not expect the claims to be bundled together in the same forum. See *Tucker v. Shaw*, 308 F.Supp. 1, 9 (E.D. N.Y. 1970).[4]

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[2]Id. at 662. The term of course denotes the additional party, whether plaintiff or defendant, that has been brought into the litigation by the application of the pendent jurisdiction doctrine. The claim asserted by or against this party is not within the subject matter jurisdiction of the federal courts.

[3]Compare *Stone v. Stone*, 405 F.2d 94 (Fourth Cir. 1968), *Jacobsen v. Atlantic City Hospital*, 392 F.2d 149 (Third Cir. 1968), and *Hatridge v. Aetna Casualty & Surety Co.*, 415 F.2d 809 (Eighth Cir. 1969) with *Wojtas v. Village of Niles*, 334 F.2d 797 (Seventh Cir. 1964) (civil rights action), *Gautreau v. Central Gulf Steamship Corp.*, 255 F.Supp. 615 (E.D. La. 1966) (Jones Act), and *Tucker v. Shaw*, 308 F.Supp. 1 (E.D. N.Y. 1970) (action under § 501(b) of the Labor-Management Reporting and Disclosure Act of 1959).

[4]This court does not place great emphasis upon this factor, since to a certain extent, it has been ill-conceived. The Supreme

Probably the most influential factor, however, has been that in the diversity cases where "pendent parties" have been permitted, the courts have generally been confronted with claims by members of a single family arising out of a single accident. See Wright, *Federal Courts* (2nd Ed. 1970) at 124, and cases cited therein at n.19. The litigation of these intimately related claims in a single forum makes good practical sense. Moreover, the fact that the claims are so closely related more readily permits the conclusion that the claims comprise but one constitutional "case or controversy." See *United Mine Workers v. Gibbs*, 383 U.S. 715 at 725; *Stone v. Stone*, 405 F.2d at 97-8. In the federal question context, however, no such considerations generally exist.

What this analysis demonstrates is this: In *Hymer v. Chai*, the Ninth Circuit was presented with the most favorable of circumstances in which to apply pendent jurisdiction to join an additional party: the claims were state claims; they were closely related; the "pendent party" would be a plaintiff. Nonetheless, the court refused to apply the doctrine. In light of that decision, this court is unable to permit the application of the doctrine to the present case.[6]

Court in *Gibbs* stated that the claims should be considered *without regard to their federal or state character* in dealing with the issue of whether all the claims would ordinarily be tried in one judicial proceeding. 383 U.S. at 725.

[6]Without expressing any opinion on the following, the court notes that even were it free of the influence of *Hymer v. Chai*, serious obstacles to the application of the doctrine would still present themselves. First, on the issue of the *power* to adjudicate the claim, the court would still be confronted with the reluctance of other federal courts to permit a pendent party defendant in a federal question case. See *Wojtas v. Village of Niles, Gautreau*

(This footnote is continued on next page)

A final problem which the court must consider is whether the recent Ninth Circuit decision in *Hesselgesser v. Reilly*, No. 26,079, April 8, 1971, indicates the existence of subject matter jurisdiction regarding plaintiff's state claims against the County. In *Hesselgesser*, a prisoner sought damages under the Civil Rights Act against the Sheriff of Spokane County, Washington, (and the Sheriff's official bond), and a deputy sheriff who served as jailer. The court observed that the plaintiff's claim against the sheriff and his bond was not predicated upon any personal knowledge or personal involvement of the sheriff in the wrongs committed by his deputy. Rather, the claim was based upon Washington statutes which, as plaintiff alleged and the court found, provided that sheriffs would be liable for the negligence and misconduct of their deputies irrespective of any lack of knowledge or participation on the part of the sheriff. The Court of Appeals construed § 1988 of the Civil Rights Act (42 U.S.C § 1988) as authorizing the application of that state law, and accordingly reversed a judgment n.o.v. which had been entered in favor of the sheriff and his bond.

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v. Central Gulf Steamship Corp., and *Tucker v. Shaw*, all *supra* at n.3.

Moreover, on the issue of the court's *discretion* to adjudicate the pendent claim, there would still be substantial doubts as to whether the state claim should be heard. The present action will be tried to a jury, and with the introduction of a claim against the County under the California Tort Claims Act, with the special defenses available to the County, the case could become unduly complicated. Further, this court would be called upon to resolve difficult questions of California law upon which state court decisions are not legion. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 726-27 (1966); Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 Stan. L.Rev. 262, 265-66 (1968).

Plaintiff herein contends that under *Hesselgesser*, if California law provides a cause of action against the County-defendant for the alleged misconduct of county employees, then § 1988 provides the means of recognizing that cause of action, *and* confers jurisdiction upon this court to hear that action.[6]

The fault with this argument is that the latter proposition is erroneous: § 1988 does not supply the court with federal subject matter jurisdiction. Rather, in the words of the Ninth Circuit, the section ". . . pertains not to subject-matter jurisdiction, but to the forms of process and the scope of remedy." *Pierre v. Jordan*, 333 F.2d 951, 958 (1964); *Johnson v. New York State Ed. Dept.*, 319 F.Supp. 271, 276 (E.D. N.Y. 1970); cf. *Sullivan v. Little Hunting Park*, 396 U.S. 229, 239-40 (Douglas, J., for the Court), 256-57 (Harlan, J., dissenting opinion). Section 1988 empowers federal district courts to draw upon state law to fashion appropriate, effective remedies for civil rights violations. In so doing, the court may recognize a state law cause of action, as was done in *Hesselgesser*. But § 1988 is not "jurisdictional" in the sense that, for example, § 1983 is: it does not create a federal cause of action which is thereby cognizable in the district courts under § 1331 and/or § 1343 of Title 28.

The *Hesselgesser* opinion is therefore somewhat mysterious insofar as considerations of subject matter jurisdiction are concerned. The court looked to the law

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[6]Plaintiff apparently also argues that if *Hesselgesser* does not stand for the proposition that § 1988 is jurisdictional, then it surely means that the Ninth Circuit has now endorsed the "pendent party" concept, contrary to *Hymer v. Chai*. Both propositions will be discussed.

of Washington to hold the sheriff of the County liable so that a suitable remedy would be furnished the plaintiff, namely, recourse to the official bond. But the court did not discuss the basis upon which the federal courts had subject matter jurisdiction to adjudicate that state claim. While it appears that the state claim could only have been adjudicated upon some theory of ancillary or pendent jurisdiction, this court is not prepared to draw conclusions upon issues of such moment from an opinion which is silent upon the subject. In effect, plaintiff asks this court to conclude that *Hesselgesser* undermined *Hymer v. Chai sub silentio*. The court declines the invitation.

Accordingly, this court's orders granting the County of Alameda's motions to dismiss are affirmed, and plaintiff's motion herein is DENIED.

So Ordered.

Dated: August 30, 1971.

/s/ Robert F. Peckham
United States District Judge

APPENDIX G.

Order.

In the United States District Court, Northern District of California.

Robert Scheer, Plaintiff, vs. Frank Madigan, et al., Defendants. No. C-70 155 RFP.

There are three motions before the Court. Each will be treated in turn.

I. Motion to Dismiss. While plaintiff makes interesting arguments, this Court feels bound by the weight of authority to grant the motion and dismiss defendant City of Berkeley and the County of Alameda as to the first and second causes of action. *E.g., Brown v. Town of Caliente,* 392 F.2d 546 (9th Cir. 1968). The pendant claims must also be dismissed. *Hymer v. Chai,* 407 F.2d 136 (9th Cir. 1969).

. . .

IT IS SO ORDERED.

Date: June 17, 1970.

/s/ Robert F. Peckham
United States District Judge

APPENDIX H.

Order.

In the United States District Court, Northern District of California.

Daniel Porter, a minor, by & through his Guardian ad Litem, Donald E. Porter, Plaintiff, vs. Frank Madigan, et al., Defendants. No. C-70 384 RFP.

This matter comes before the Court on plaintiff's motion to strike defendant Schillinger's affirmative defenses two, three, four and seven and on defendant City of Berkeley's motion to dismiss. Alameda County has joined in this motion.

II. Motion to Dismiss. Plaintiff makes a provocative and persuasive argument that the abolition of municipal immunity should permit assertion of liability under § 1983. Were this Court free to determine the issue for itself, it might well agree with plaintiff. However, we feel compelled by the substantial weight of authority to hold that a local government may not be held liable under § 1983 as presently construed. *Brown v. Town of Caliente*, 392 F.2d 546 (9th Cir. 1968). Therefore the motion to dismiss must be granted as to the federal cause of action as to the City of Berkeley and the County of Alameda.

As to the pendant claim, the motion will be granted. *Hymer v. Chai*, 470 F.2d 136 (9th Cir. 1969).

IT IS SO ORDERED.

DATED: June 16, 1970.

/s/ Robert F. Peckham
United States District Judge

APPENDIX I.

[Letterhead].

University of California, Berkeley

California Law Review
School of Law
Berkeley, California 94720

May 17, 1972

Richards, Watson & Dreyfuss
Wilshire-Flower Building
615 South Flower Street
Los Angeles, California 90017

Dear Sirs:

I am writing a comment for The California Law Review on "pendent parties" as an extension of pendent jurisdiction. I am interested in the case of Rundle v. Madigan, 331 F.Supp. 492, No. C- 70 334, Aug. 30, 1971, in which you were attorneys for the plaintiff. If it would be possible to have a copy of the brief I would be happy to pay for costs.

Sincerely yours,

/s/ Stephen Yoder
Stephen Yoder
Managing Editor

APPENDIX J.

[Letterhead].

The University of Toledo
College of Law

June 6, 1972

Mr. Ronald M. Greenberg
Richards, Watson & Dreyfuss
615 S. Flower St.
Los Angeles, Cal. 90017

Re: Moor v. Madigan, et al. No. 71-3019
Rundle, et al. v. Madigan, et al. No. 71-3020
April 12, 1972

Dear Mr. Greenberg:

A member of our Law Review staff is writing a note on the above set of cases. To assist him in his work, it would be very valuable if he could make use of your briefs and records in these cases. If any subsequent action has been taken, that information would also be of interest.

These papers will be returned if you so desire, and they should not be needed for more than a few months. We will be happy to send you a complimentary copy of the student Law Review in which the note appears. Thank you very much for your cooperation.

Sincerely,

/s/ Thomas A. Breslin
Thomas A. Breslin
Editor-in-Chief
TAB/dma

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No.

DAVID MOOR, *Petitioner*

VS.

FRANK I. MADIGAN; GLEN DYER; THOMAS L. HOUCHENS; LOUIS SANTUCCI; LAWRENCE L. RICHE; and COUNTY OF ALAMEDA, *Respondents*

WILLIAM DONOVAN RUNDLE, JR., a minor by WILLIAM D. RUNDLE, his guardian ad litem; WILLIAM D. RUNDLE and SARAH RUNDLE, *Petitioners*

VS.

FRANK I. MADIGAN; GLEN DYER; THOMAS L. HOUCHENS; LOUIS SANTUCCI; LAWRENCE L. RICHE; and COUNTY OF ALAMEDA, *Respondents.*

BRIEF IN OPPOSITION

QUESTIONS PRESENTED

As stated by the Ninth Circuit Court of Appeal:

> Three broad issues are thus presented by appellants. First, they argue that their Civil Rights Act claims against the County are viable, notwithstanding the fact that the County is not a "person" within section 1983 of the Act. Second, they contend that even if they did not present a cognizable federal cause of action against the County, the district court should have retained jurisdiction of the pendent state claims against the County. Finally, appellant Moor argues that the County is a "citizen" for federal diversity jurisdiction purposes.

I

NO COURT HAS HELD THAT A STATE, OR ITS SUBDIVISION, MAY BE SUED UNDER 42 USC SECTIONS 1981-88

Since *Monroe v. Pape,* 365 U.S. 167 (1961), every court considering the question has held that the Ku Klux Klan Act may not be used to impose vicarious liability on a state or its political subdivisions. *See,* e.g., *Ries v. Lynskey,* 452 F.2d 172 (7th Cir. 1971); *Yumich v. Cotter,* 452 F.2d 59 (7th Cir. 1971); *Davis v. United States,* 439 F.2d 1118 (8th Cir. 1971); *Hill v. City of El Paso, Texas,* 437 F.2d 352 (5th Cir. 1971); *Zuckerman v. Appellate Div. Sec. Dept.,* S.Ct. of St. of N.Y., 421 F.2d 625 (2d Cir. 1970); *United States ex rel. Gittlemacker v. County of Philadelphia,* 413 F.2d 84 (3d Cir. 1969), cert. denied, 396 U.S. 1046 (1970); *Brown v. Town of Caliente,* 392 F.2d 546 (9th Cir. 1968).

Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971) does not represent a conflicting *holding.* As pointed out by the court below and in *Ries v. Lynskey,* 452 F.2d 172, 175 (7th Cir. 1971), *Carter* dealt with a *Federal* and not a state entity.

Respondent respectfully suggests that there is no real conflict in the decisions, that the analysis of the Seventh and Ninth Circuits on this point is correct, and that intervention by this court is not required.

Since *Monroe v. Pape,* 365 U.S. 167, 191 (1961) held that public entities could not be sued under the 1871 Act, Congress has several times passed major civil rights legislation without changing that rule. States have undoubtedly relied upon the rule in formulating their immunity statutes. To judicially change the rule now is unnecessary and would upset the intended scope of the involved state and federal statutes.

II

PENDENT JURISDICTION WAS NOT AVAILABLE TO PETITIONERS AS A VEHICLE TO BRING AN ADDITIONAL PARTY INTO THE LAWSUIT EITHER AS A MATTER OF POWER OR BY THE EXERCISE OF DISCRETION

Petitioners have asked the courts below, and ask this court, to extend federal jurisdiction beyond constitutional or Congressional grants.

> "Pendent jurisdiction," as the term has been used in this section, refers only to the joinder of state and federal claims. . . . The pendent jurisdiction concept applies only where the same par-

> ties are involved on the state and federal claims. It does not permit bringing in an additional party to respond to a state claim on the ground that a claim is closely related to the federal claim against an existing party. Wright, *Federal Courts,* 65 (2d ed. 1970).

See also 3A *Moore's Federal Practice* (Supp.) ¶18.07; Shakman, *The New Pendent Jurisdiction of the Federal Courts,* 20 Stan. L.Rev. 262 (1968).

Here, there is *no basis* for federal jurisdiction as to the county and no Congressional or constitutional authority for extension of federal power to hear only a state law cause of action against that public entity.

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) held only that where federal jurisdiction independently exists as to a party, additional related claims against that party may be heard. *Hatridge v. Aetna Casualty & Surety Co.,* 415 F.2d 809 (8th Cir. 1969) is equally limited since the party in question was already before the court in a related and consolidated case. As the court there held at p. 816:

> We conclude that the Hatridge claims are so intertwined and so interdependent that federal jurisdiction of the primary claim appropriately promotes and supports federal jurisdiction of the other or, perhaps more accurately, prevents separation of the two for forum shopping purposes.

The other case upon which petitioners principally rely, *Astor-Honor, Inc. v. Grosset & Dunlap, Inc.,* 441 F.2d 627 (2d Cir. 1971) specifically held at p. 630

that the pendent jurisdiction point was not being decided since the court had jurisdiction by virtue of 28 U.S.C. §1338(b).

Further, on the facts of *this* case, after complete briefing, both the District Court and the Ninth Circuit Court of Appeals felt that as a matter of discretion, pendent jurisdiction was not appropriate. The District Court stated in this regard:

> Moreover, on the issue of the court's *discretion* to adjudicate the pendent claim, there would still be substantial doubts as to whether the state claim should be heard. The present action will be tried to a jury, and with the introduction of a claim against the County under the California Tort Claims Act, with the special defenses available to the County, the case could become unduly complicated. Further, this court would be called upon to resolve difficult questions of California law upon which state court decisions are not legion. See *United Mine Workers v. Gibbs,* 383 U.S. 715, 726-27 (1966); Shakman, *The New Pendent Jurisdiction of the Federal Courts,* 20 Stan.L.Rev. 262, 265-66 (1968). *Rundle v. Madigan,* 331 F.Supp. 492, 495 (N.D. Cal. 1971).

It is therefore unnecessary on the particular facts of this case to consider whether the court had the power to hear the state claim. *Patrum v. City of Greenburg,* 419 F.2d 1300 (6th Cir. 1969), cert. denied, 397 U.S. 990 (1970).

III

THE COUNTY IS NOT A CITIZEN OF THE STATE OF CALIFORNIA

The Ninth Circuit has twice ruled that in California counties are not citizens for purposes of diversity jurisdiction. Whatever may be the rule for counties of other states, or for municipal corporations, on the facts presented here to the courts below it is clear that the County of Alameda is merely a subdivision of the state and not a citizen.

Because the court below did not engage in an extended discussion in its opinion on whether the county here was sufficiently corporate under federal law to be a "citizen" does not make the court's decision incorrect or warrant petitioner's accusation that the court ignored a mandate of this court.

Petitioners are simply asking this court to re-evaluate the facts presented below in a question of significance only to California counties.

CONCLUSION

This case does not have the significance petitioners seek to impart to it. Since the Ku Klux Klan Act was enacted a century ago, it has consistently been held not to encompass suits against the state or its agencies. The only decision even questioning that tenet is *Carter v. Carlson,* 447 F.2d 358 (D.C. Cir. 1971) which dealt with a federal entity and which is therefore distinguishable.

The Ninth Circuit Court of Appeal correctly held that *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966) did not authorize forcing a defendant to litigate in Federal Court where there is no basis for federal jurisdiction against that defendant. In any event, a *Gibbs* analysis by the courts below shows that as a matter of discretion pendent jurisdiction was not appropriate on the facts of this case. The question of citizenship for diversity jurisdiction is equally factual, turning upon an analysis of the particular state-county relationship.

Thus, as to the jurisdiction issues, petitioners simply seek a re-analysis of factual determinations by the courts below.

The petition for certiorari should be denied.

Dated, Oakland, California,
July 24, 1972.

Respectfully submitted
RAOUL D. KENNEDY,
CROSBY, HEAFEY, ROACH & MAY,
Counsel for Respondents.

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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-10

DAVID MOOR, *et al.*,

Petitioners,

vs.

COUNTY OF ALAMEDA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONERS.[1]

Citations to Opinions Below.

The opinion of the Circuit Court of Appeals, a copy of which is attached as Appendix A to the Petition for Writ of Certiorari, at 1, is reported in 458 F.2d 1217 (9th Cir. 1972). A copy of the order of the Circuit Court of Appeals denying petitioners' petition for re-

[1]The petitioners in addition to David Moor are William Donovan Rundle, Jr., a minor, by William D. Rundle, his guardian ad litem; William D. Rundle and Sarah Rundle. The respondents in addition to the County of Alameda are Frank I. Madigan, Glenn Dyer, Thomas L. Houchens, Louis Santucci and Lawrence L. Riche. David Moor and the Rundles each filed a separate case in the district court against the above named respondents. Because the issues raised on appeal to the court below in each case are identical, except that the *Moor* case involves the additional issue of diversity jurisdiction, the court below ordered the appeals consolidated. (Appendix C to the Petition for Writ of Certiorari, at 14.)

hearing and for rehearing in banc is attached as Appendix B to the Petition for Writ of Certiorari, at 13. A copy of the order of the Circuit Court of Appeals consolidating the above captioned matters and granting petitioners' motion for an expedited hearing is attached as Appendix C to the Petition for Writ of Certiorari, at 14. Copies of the orders of the District Court, or portions thereof, which relate to the issues involved herein are attached as Appendices D, E and F to the Petition for Writ of Certiorari, at 15, 18 and 21 respectively, and the order attached as Appendix F is reported in 331 F. Supp. 492 (N.D. Cal. 1971). Portions of companion cases relating to the issues involved herein are attached as Appendices G and H to the Petition for Writ of Certiorari, at 31 and 32 respectively.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on April 12, 1972. A timely petition for rehearing was filed on April 24, 1972 and denied on May 30, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. Whether, if state law imposes vicarious liability upon its public entities for violations of the Civil Rights Acts (42 U.S.C. §§1981 *et seq.*) committed by the entities' employees, a federal court can use 42 U.S.C. §1988 to adopt that state law and, thereby, obtain jurisdiction under 28 U.S.C. §§1343(3) and (4) to impose that state-created liability.

2. Whether a federal court has the power to exercise jurisdiction over a party on a pendent state law

claim when such party is not involved in the related federal claim.

3. Whether Alameda County is a "citizen" of California for diversity jurisdiction purposes.

Statutes Involved.

28 U.S.C. §§1343(3) and (4):

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

". . .

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

42 U.S.C. §1988:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed

by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

Statement of the Case.

The jurisdiction of the district court was invoked in each of these cases pursuant to 28 U.S.C. §§1343(3) and (4) because of questions arising under acts of Congress providing for the protection of civil rights (28 U.S.C. §§1981, 1983, 1985, 1986 and 1988). In the *Moor* case jurisdiction was also invoked pursuant to 28 U.S.C. §1332 because of diversity of citizenship, the plaintiff being a citizen of Illinois and the defendants citizens of California. Pendent state law claims against each of the defendants were also joined in each of the cases.

Plaintiffs in both cases seek damages from the defendants Frank I. Madgan (hereinafter "Madigan"), Thomas L. Houchens (hereinafter "Houchens"), Glenn E. Dyer (hereinafter "Dyer"), Louis Santucci (hereinafter "Santucci"), Lawrence L. Riche (hereinafter "Riche") and the County of Alameda (hereinafter "County") for alleged Civil Rights Acts and state law violations committed by the named individual defendants in connection with their involvement in the People's Park disturbances in Berkeley, California on May 15, 1969.

Suit, in each case, was filed on February 12, 1970 (A. 5 and A. 22, respectively) and alleges that the

defendant Riche shot both the plaintiff David Moor and the plaintiff William Donovan Rundle, Jr. at approximately the same time and place without cause or provocation, and that the defendants Madigan, Houchens, Dyer and Santucci failed properly to discharge their duties and responsibilities as officers and commanders in connection with the defendant Riche's activities and the People's Park disturbance thus allowing those shootings to occur. The defendant County is alleged to have vicarious liability under California law for those acts and omissions of the individually named defendants. Plaintiffs also alleged that the County consented under California law to be sued. (A. 5 and A. 22-23, respectively).

On March 9, 1970 each of the defendants, including the County, filed an answer denying liability, (A. 11 and A. 28 respectively), but admitting that the County had so consented to be sued. (A. 11-12 and A. 28-29, respectively).

Thereafter, on August 18, 1970, the County, after first engaging in preliminary discovery motions in both cases, filed a motion to dismiss in the *Rundle* case for lack of jurisdiction over it. (A. 1).

On September 14, 1970, the County, filed a motion to dismiss in the *Moor* case for lack of jurisdiction over it as to the Civil Rights Acts claims only (A. 2).

These motions to dismiss were both heard on January 21, 1971. On March 31, 1971, the court issued an order granting the County's motion to dismiss in the *Rundle* case, postponing a ruling in the *Moor* case and requesting further points and authorities on the diversity jurisdiction aspect of that case (Appendix D to the Petition for Writ of Certiorari, at 15). The

County filed those points and authorities on April 9, 1971 and therein requested, for the first time, that the district court dismiss it from the state law claims on the ground that it was not a "citizen" of California for diversity jurisdiction purposes (A. 2). This point was then further briefed by both parties (A. 2).

On April 23, 1971, the plaintiffs in the *Rundle* case filed a motion for reconsideration of the order dismissing the County (A. 2).

Argument on the motion for reconsideration in the *Rundle* case and further argument in the *Moor* case on the diversity jurisdiction issue were heard on May 21, 1971. On August 25, 1971, the district court issued an order in the *Moor* case which rejected the plaintiff's diversity jurisdiction contention (Appendix E to the Petition for Writ of Certiorari, at 18). On August 30, 1971, the district court issued an order in the *Rundle* case which rejected the plaintiffs' pendent jurisdiction contention as to the state law claims (Appendix F to the Petition for Writ of Certiorari, at 21).

On September 3, 1971, the plaintiffs in both cases filed a request for entry of final judgment as to less than all parties under Rule 54(b) of the Federal Rules of Civil Procedure in order to bring the jurisdictional issues discussed above to the attention of the court below as expeditiously as possible (A. 3). The district court thereafter filed an order in each case authorizing the entry of a partial judgment in each case (A. 20 and A. 37, respectively), and on September 20, 1971, a judgment was signed in each case dismissing the County as a party defendant (A. 21 and A. 38, respectively).

On October 18, 1971, plaintiffs filed their notice of appeal in each case (A. 3).

On April 12, 1972, the court below affirmed the dismissal of the County in each case. (Appendix A to the Petition for Writ of Certiorari, at 1). A timely petition for hearing was filed on April 24, 1972 and subsequently denied on May 30, 1972, (Appendix B to the Petition for Writ of Certiorari, at 13).

A petition for a Writ of Certiorari was filed in this Court on June 30, 1972 and granted on October 10, 1972.

Summary of Argument.

Plaintiffs' primary contention is that because of 42 U.S.C. §1988 a federal district court has jurisdiction under 28 U.S.C. §§1343(3) and (4) to impose vicarious liability created under state law upon a public entity for violations of the Civil Rights Acts (42 U.S.C. §§1981 *et seq.*) committed by the entities' employees.

In urging this contention, plaintiffs are not taking issue with the holding in *Monroe v. Pape*, 365 U.S. 167 [81 S.Ct. 473, 5 L.Ed.2d 492] (1961) that public entities are not "persons" under 42 U.S.C. §1983. However, plaintiffs submit that the extent of that holding is simply that Congress, when it enacted §1983, did not intend for that provision to impose vicarious liability upon a public entity. Implicit in *Monroe*, though, and in the legislative debates that it relied upon, is that if state law imposed such vicarious liability upon its public entities then a federal court could, consistent with its jurisdictional requirements, impose that state-created liability.

To reach this result plaintiffs rely heavily upon 42 U.S.C. §1988 which, by its terms, authorizes a federal court to adopt state law in order to render the Civil Rights Acts fully effective. Inherent in plaintiffs' position is that California law imposes liability upon its

public entities for violations of the Civil Rights Acts committed by their employees. Thus, plaintiffs are saying that whereas the County's liability for the Civil Rights Acts violations of its employees is based upon state law, jurisdiction exists in the district court to impose that liability because of §1988 and 28 U.S.C. §§1343(3) and (4).

With respect to the pendent state law claims, if there is a basis for federal jurisdiction over the County, as urged above, then well-accepted concepts of pendent jurisdiction would apply. If, however, a basis of federal jurisdiction over the County cannot be found, then plaintiffs take the position that the district court has the power to and should assume jurisdiction over the County on the pendent state law claims. This is because the pendent state law claims are otherwise properly before the district court due to the presence of the other defendants, and because the County would clearly be a defendant on those pendent state claims had they been brought in a state court.

Furthermore, the presence of the County as a defendant will add no major issues to the cases nor extend their time of trial since the County's liability is vicarious and depends primarily upon the simple issue of whether the defendant employees were acting within the scope of their employment. To thus join the County as a pendent party would truly promote judicial economy and avoid multiple litigation.

Finally, in the *Moor* case only the plaintiff submits that in view of the overwhelming weight of federal authority, the court below erred in concluding that a county in California is not a "citizen" for diversity jurisdiction purposes.

ARGUMENT.

I.

42 U.S.C. Section 1988 Authorizes a Federal Court to Adopt State Law That Imposes Vicarious Liability Upon Its Public Entities for Violations of the Civil Rights Acts (42 U.S.C. §1981 et seq.) Committed by the Entities' Employees, and 28 U.S.C. Sections 1343(3) and (4) Confer Jurisdiction to Impose That State-Created Liability.

A. Analysis of Applicable Federal Law.

Plaintiffs' initial contention is that R.S. §722, 42 U.S.C. §1988 (hereinafter "§1988") authorizes a federal court to adopt state law that imposes vicarious liability upon its public entities for the violations of the Civil Rights Acts (42 U.S.C. §§1981 *et seq.*) committed by the entities' employees and, thereby, to acquire jurisdiction pursuant to 28 U.S.C. §§1343(3) and (4) over those public entities to impose that state-created liability. In urging this contention plaintiffs are not taking issue with the holding in *Monroe v. Pape*, 365 U.S. 167 [81 S.Ct. 473, 5 L.Ed.2d 492] (1961), that Congress did not intend to impose vicarious liability upon a public entity when it enacted R.S. §1979, 42 U.S.C. §1983 (hereinafter "§1983"), nor are plaintiffs seeking to enlarge the scope of §1983 as defined in *Monroe*. Rather, plaintiffs contend that there is nothing inconsistent with the holding in *Monroe* that Congress did not intend to impose a federally created liability upon public entities for §1983 violations committed by the entities' employees and a holding herein that a state may impose a state-created liability upon its public entities for such employee violations, which liability a federal court, in turn, has jurisdiction to impose.

In support of this contention, plaintiffs rely upon §1988, which provides in pertinent part:

> "[I]n all cases where [the laws of the United States] are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies . . . the common law . . . of the State wherein the court having jurisdiction . . . is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . ."

With respect to §1983, if, as *Monroe* held, the purpose of that Section was to provide a federal remedy for the deprivation of a constitutional right, which remedy is over and above any arguable state remedy for such deprivation, *Monroe v. Pape*, 365 U.S. at 174,[3] and if, because of a belief that Congress was without the power to extend the scope of that federal remedy to encompass public entities, Congress limited §1983's scope to "persons" apart from public entities, *Monroe v. Pape*, 365 U.S. at 187-192, then §1983 is not fully "adapted to the object" or is "deficient in the provi-

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[3]In a concurring opinion Messrs. Justices Harlan and Stewart attached even more significance to §1983:

> "The statute becomes more than a jurisdictional provision only if one attributes to the enacting legislature the view that a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right. This view, by no means unrealistic as a common-sense matter, is, I believe, more consistent with the flavor of the legislative history than is a view that the primary purpose of the statute was to grant a lower court forum for fact findings. . . ." 365 U.S. at 196.

sions necessary to furnish suitable remedies." For, despite the personal liability of an individual defendant, a great number of abuses may still go unremedied simply because the offender is judgment-proof. Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S.Cal.L.Rev. 131, 136-137 (1972). *Cf. Lankford v. Gelston*, 364 F.2d 197, 202 (4th Cir. 1966). Thus, to the extent that state law cures this limitation upon the effectiveness of §1983 by imposing vicarious liability upon the offender's public entity employer, that state law is consistent with the Constitution and laws of the United States. *Cf. Hesselgesser v. Reilly*, 440 F.2d 901 (9th Cir. 1971); *Lewis v. Brautigam*, 227 F.2d 124 (5th Cir. 1955). In both of these Civil Rights Acts cases the federal court looked to state law that imposed liability upon a sheriff for the acts of his deputy.

When presented with this analysis, however, the court below in essence ignored it and relied instead upon its earlier opinion in *Brown v. Town of Caliente*, 393 F.2d 546 (9th Cir. 1968). That reliance, though, is not responsive to the issue since *Brown* holds only that liability under §1983 cannot be enlarged by state law, whereas the issue is whether a federal court can impose a state-created liability irrespective of the scope of §1983.

While plaintiffs have not found a case which analyzes this precise issue, in response to *Brown* plaintiffs cited *Carter v. Carlson*, 447 F.2d 358, 369 (D.C. Cir. 1971); *petition for cert. filed*, 40 U.S.L.W. 3308 (U.S.

Oct. 26, 1971) (No. 71-564), *cert. granted sub nom.* 404 U.S. 1014 [92 S.Ct. 683, 30 L.Ed.2d 661] (1972), which ruled, contrary to the court below, that the scope of §1983 could be enlarged through §1988's adoption of state law.[3] Though conceptually plaintiffs are approaching the issue from a different premise than *Carter*, namely the jurisdiction of a federal court to impose a state-created liability as opposed to an expanded scope of federal liability, the net result for the plaintiffs is the same; to wit, the imposition of vicarious liability upon a public entity.

The court below, however, when confronted with *Carter*, refused to adopt its approach, stating:

> "Insofar as the *Carter* case would impose liability under section 1988 on municipalities other than the District of Columbia, *it is inconsistent with our decision in* Brown v. Town of Caliente *and we do not follow it.*" Appendix A to Petition for Writ of Certiorari, at 6. (Emphasis added.)

The Seventh Circuit Court of Appeals has also purported to deal with the §1988 issue in *Ries v. Lynskey*, 452 F.2d 172 (7th Cir. 1971). However, while recognizing the above dichotomy of opinion between the *Brown* court and the *Carter* court on the scope of *Monroe*, the *Ries* court avoided the issue by resting its decision on an analysis similar to *Brown*, namely that state law could not enlarge the scope of §1983. *Id.* at 175.

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[3]Plaintiffs have not urged the expanded scope of §1983 analysis urged by the respondent in *Carter*, but do support such analysis as an alternative approach. However, to avoid repetition, and because plaintiffs believe that the approach they suggest is more logically consistent with *Monroe*, plaintiffs will leave the expanded scope of §1983 analysis to the respondent in *Carter*.

Thus, to date there has been no opinion which has actually dealt with the issue raised herein. As a result, *Monroe v. Pape, supra,* and the legislative history of the Civil Rights Acts must be analyzed for the answer.

Monroe involved an action under §1983 against Chicago policemen and the City of Chicago as their employer for damages for alleged atrocities committed by the policemen. While this Court recognized a federal right of action against the policemen, it held that no such federal right of action existed against the City because it believed that Congress intended to exclude municipalities as defendants from the meaning of the term "person" in §1983 (365 U.S. at 191). That this was the limit of what the Court held and that there was no issue in *Monroe* of state waiver of immunity or of any other section of the Civil Rights Acts except §1983 can be seen in the Court's statement concerning the scope of what it was considering:

> "Before this Court, however, petitioners have limited their claim to recovery to the liability imposed by §1979 [42 U.S.C. §1983]. Accordingly, only that section is before us." 365 U.S. at 169-170, n. 2.

In reaching its decision on the scope of §1983 the Court examined the legislative history of the 1871 Civil Rights Acts. A review of that legislative history shows that while it can be said to support *Monroe* when limited to its facts, it also can be said to support the plaintiffs' contention concerning a federal court's jurisdiction to impose a state-created liability.

The legislative history relied upon in *Monroe* was not anything in the debates on §1983, for those de-

bates contain no discussion of municipal liability, but rather was on the rejection by Congress of another proposed section, the so-called Sherman Amendment, which would have imposed federal liability upon counties and/or cities in which attacks on Negroes occurred.[4] In referring to those debates, the Court in *Monroe* noted that the House of Representatives twice rejected the Sherman Amendment because:

> ". . . in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of state law." 365 U.S. at 190.

That statement is from a quote by Representative Poland, a firm supporter of the Civil Rights Acts, but the leader of the opposition to the Sherman Amendment. See Cong. Globe, 42d Cong., 1st Sess. 804 (1871). Similar statements concerning a lack of power in the federal government to impose this kind of liability upon cities and counties can be seen in the statements of Representatives Kerr, Willard and Blair. *Id.* at 788, 791 and 795 respectively.

This analysis illustrates the impossibility of drawing from the Sherman Amendment debates any negative inference concerning vicarious municipal liability for violations of the Civil Rights Acts committed by its employees where municipalities are vicariously liable under state law. On the contrary, the theory upon which Congress rejected the Sherman Amendment would, in fact, compel the inference that Congress intended municipalities to be liable under the Civil Rights

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[4]The two slightly different versions of the Sherman Amendment are printed in *Monroe* at 365 U.S. 167, nn. 38 and 41.

Acts to the extent that they are liable under state law. *See* Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S.Cal.L.Rev. 131, 136 (1972). This is because of a belief that the state had exclusive power to define the attributes of its agencies and that the federal government could regard them in no other fashion than as the state had defined them. Thus, the federal government could no more endow counties and cities with immunity than with liability; it must take them as it found them. In so doing, however, if state law imposed a particular liability upon its local entities, federal courts, consistent with their jurisdictional restrictions, could impose that liability. For, as observed by Representative Poland:

> "I presume, too, that where a state had imposed a duty upon such municipality, and provided they should be liable for any damages caused by failure to perform such duty, *that an action would be allowed to be maintained against them in the courts of the United States under the ordinary restrictions as to jurisdiction.* But the enforcing of a liability, existing by their own contract, or by a state law, in the [federal] courts, is a very widely different thing from devolving a new duty or liability upon them by the national government, which has no power either to create or destroy them, and no power or control over them whatever." Cong. Globe, *supra* at 794. (Emphasis added.)

Similar statements were made by Representatives Kerr, Blair, Burchard and Bingham, *id.* at 789, 795 and 798, respectively. *See also* Kates & Kouba, *supra* at 158-159.

Yet, in spite of this legislative history and the obvious restrictive import of *Monroe*, the decision of the court below goes far beyond *Monroe*, and defeats the Congressional purpose enunciated in §1988 to supplement the Civil Rights Acts with all remedies available under state law. In so doing the court below ignored the principle of §1988 enunciated in *Brazier v. Cherry*, 293 F.2d 401, 409 (5th Cir. 1961), to wit: ". . . what is needed in the particular case under scrutiny to make the civil rights statutes fully effective?" This principle was recognized by this Court in *Sullivan v. Little Hunting Park*, 395 U.S. 229, 240 [90 S.Ct. 400, 24 L.Ed.2d 386] (1969):

> "This means, as we read §1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. Cf. Brazier v Cherry, 293 F2d 401. The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired."

See also Pritchard v. Smith, 289 F.2d 153 (8th Cir. 1961) (§1988 used to adopt state law concerning survival of actions).[5]

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[5]In *Sherrod v. Pink Hat Cafe*, 250 F.Supp. 516, 519 (N.D. Miss. 1965), the court stated with respect to §1988:

> "This is a broad congressional direction to the federal court system to draw on state law when to do so will carry out and fulfill the purposes of other congressional enactments designed to protect persons in their civil rights. The Civil Rights Act of 1964 is such an enactment, designed to protect persons in such rights and in particular to protect them in the right to equal and non-discriminatory treatment in public accommodations. *Hence, state law may be resorted to here to supply a remedy in damages that is not specifically provided by the Civil Rights Act of 1964.*" (Emphasis added.)

Likewise, state law should be resorted to herein to supply a remedy in damages that is not specifically provided by §1983.

Given the fact that a plaintiff cannot, as a practical matter, bring a costly action under the Civil Rights Acts against police officers who abuse their authority unless there is some hope of recovery, and recognizing that if the plaintiffs prevail it is unlikely that any of the individual defendants could satisfy a large judgment from their own assets or insurance (*cf. Lankford v. Gelston*, 364 F.2d 197, 202 (4th Cir. 1966)), unless a federal court utilizes §1988 to adopt state law that imposes vicarious liability upon its public entities, the civil remedy afforded by §1983 is rendered relatively ineffective. Thus, as Messrs. Kates and Kouba state:

> "As previously suggested, without municipal liability, the federal civil liability imposed upon government officials has proved insufficient to fulfill the objectives of the Civil Rights Act. By providing responsible defendants, municipal liability will help restore plaintiffs to their *status quo ante* and may encourage behavioral reform to the currently unsatisfactory state agencies. There is no reason to believe that the Georgia wrongful death statute in *Brazier* is somehow more suitable for incorporation than a state municipal liability statute. A severely wounded plaintiff who cannot collect his award because the individual defendants are judgment proof is as disadvantaged as the widow in *Brazier* who was not expressly protected under a federal statute. In both cases, the constitutionally protected rights may be meaningless without the state statute." Kates & Kouba, *supra* at 157.

Given, therefore, this need for vicarious liability of public entities and the fact that such liability, if created by state law, is not inconsistent with *Monroe* or the

Civil Rights Acts, §1988 should clearly apply to adopt such state law. In *Bell v. Hood*, 327 U.S. 678, 684 [66 S.Ct. 773, 90 L.Ed. 939] (1946), this Court stated:

> "Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use *any available remedy* to make good the wrong done." (Emphasis added.)

To effectuate this mandate, plaintiffs submit that the analysis to apply is exemplified, ironically, by a decision of the court below, albeit in a slightly different context, in *Hesselgesser v. Reilly*, 440 F.2d 901, 902-903 (9th Cir. 1971):

> "The Civil Rights Act does not itself specifically establish a basis for liability, vicarious or otherwise, against persons who do not participate in a civil rights violation. The applicable section, 42 U.S.C. §1983, speaks only of '(e)very person who * * * subjects, or causes to be subjected, any citizen * * * to the deprivation of any rights * * *.' Thus if one who did not participate in such violation is to be held liable for the civil rights violation of another on principles of vicarious liability, or by reason of statutory responsibility, it must be because: (1) the Civil Rights Act gives recognition to the laws of the states pertaining to such liability and, (2) the laws of the particular state where the action arose create such liability.

"We think the Civil Rights Act does authorize the application, under appropriate circumstances, of state laws pertaining to vicarious liability and liability created by statute. Under 42 U.S.C. §1988, quoted in the margin, where the laws of the United States are deficient in the provisions necessary to furnish suitable remedies, the common law, as modified and changed by the constitution and statutes of the state wherein the case arose, shall govern the trial and disposition of civil rights actions, so far as the same is not inconsistent with the Constitution and laws of the United States. . . ."

The only difference between the instant cases and *Hesselgesser* is that in *Hesselgesser* the court below, through §1988, looked to Washington law that imposed vicarious liability upon a sheriff for the §1983 violations of a duputy. While *Hesselgesser* gave no explanation of its basis for jurisdiction, which, in turn, caused the district court in these cases a certain amount of consternation (*see* Appendix F to the Petition for Writ of Certiorari, at 28-30), it would seem that the court below had to rely for jurisdiction upon 28 U.S.C. §§1343(3) and (4) since it has categorically rejected the notion that a party can be joined on a pendent state claim when he has no involvement in the related federal claim (*See* Appendix A to Petition for Writ of Certiorari, at 7-11). Moreover, the effort of the court below to explain *Hesselgesser* by reference to §1983 liability concepts (*id.* at 6) is irrelevant since only a state-created liability was being imposed.

Another example of a case applying the concept urged by plaintiffs in an almost indistinguishable situation is *McArthur v. Pennington*, 253 F.Supp. 420 (E.D. Tenn. 1963). In *McArthur* the public entity

initially submitted to the court's jurisdiction in connection with a suit predicated upon violations of the Civil Rights Acts by the entity's employees. After trial, the public entity sought to avoid the imposition of liability on the ground that it could not be held liable under the Civil Rights Acts. The court agreed with that contention, but went on to hold that it had jurisdiction to impose liability upon the public entity because it had waived its immunity from liability by purchasing liability insurance. Here plaintiffs contend that the County has waived its immunity from liability by state law and by procuring insurance.

McArthur thus highlights the point that if there is a state law basis for finding that a public entity has waived its immunity from liability for violations of the Civil Rights Acts committed by its employees, such as by purchasing liability insurance or by a state statute imposing such liability, a federal court can impose that state-created liability upon the public entity.

Finally, if §1988 can be used by a federal court to adopt state law that imposes vicarious liability upon its public entities for violations of the Civil Rights Acts committed by the entities' employees, the only remaining question concerns the court's jurisdictional basis to impose that liability. In this connection 28 U.S.C. §1343(4) provides:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> ". . .
>
> "(4) To recover damages . . . under *any* Act of Congress providing for the protection of civil rights . . ." (Emphasis added.)

Given the context of §1988, as well as the judicial interpretations afforded it, it is patent that §1988 is, in fact, an "Act of Congress providing for the protection of civil rights." *Cf. Sullivan v. Little Hunting Park*, 396 U.S. 229, 240 [90 S.Ct. 400, 24 L.Ed.2d 386] (1969).

For these reasons plaintiffs submit that §1988 can be used by a federal court to adopt state law that imposes vicarious liability upon its public entities for violations of the Civil Rights Acts committed by the entities' employees and thereby acquire jurisdiction pursuant to 28 U.S.C. §§1343(3) and (4) to impose that state-created liability.

B. Analysis of Applicable State Law.

Inherent in plaintiffs' contention concerning §1988 is the fact that California law has imposed vicarious liability upon its public entities for violations of the Civil Rights Acts committed by the entities' employees. While this point was briefed both in the court below and in the district court, no opinion was ever rendered by either court since they both concluded that §1988 could not be used to adopt such state law. However, since plaintiffs' conception of California law is crucial to their Civil Rights Acts analysis, plaintiffs offer the following California authority in support of their position.

The starting point for analysis is the California Tort Claims Act of 1963 (§§810 *et seq.*, California Government Code) (hereinafter "Tort Claims Act"). In particular, §815.2(a), Cal. Gov't Code, provides:

> "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if

the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative."

Plaintiffs maintain that the above-described vicarious liability imposed upon a public entity arises irrespective of the nature of the cause of action that gives rise to the employee's liability. In other words, whether the employee's liability is predicated upon common law, state law or federal law is beside the point. If the employee, while acting within the scope of his employment, is held liable on "a cause of action," then under §815.2(a) the public entity is liable.

Nothing contained in §815.2(a) or the Tort Claims Act in general purports to restrict the term "cause of action" to only common law or state law causes of action. The term itself has been defined in California to encompass numerous theories of recovery. As stated in *South Shore Land Co. v. Petersen*, 226 Cal.App.2d 725, 739-740 [38 Cal.Rptr. 392] (1964):

> "The essence of a cause of action is the existence of a primary right and one violation of that right, i.e., it arises out of an antecedent primary right and corresponding duty, and a breach of such primary right and duty by the person upon whom that duty rests. (*Shell v. Schmidt*, 126 Cal.App.2d 279, 291 [272 P.2d 82]; *Smith v. Minnesota Mut. Life Ins. Co.*, 86 Cal.App.2d 581, 590 [195 P.2d 457]; *Stryker v. Republic Pictures Corp.*, 108 Cal.App.2d 191, 195 [238 P.2d 670]; *Frost v. Witter*, 132 Cal. 421, 426 [64 P. 705, 84 Am. St.Rep. 53]; *Work v. County Nat. Bank etc. Co.*, 4 Cal.2d 532, 540 [51 P.2d 90]; *Wulfjen v. Dolton*, 24 Cal.2d 891, 895 [151 P.2d 846].) The

primary right and duty and the delict or wrong constitute the cause of action in the legal sense. (*Smith v. Minnesota Mut. Life Ins. Co., supra,* p. 590.) 'The cause of action is simply the obligation sought to be enforced.' (*Panos v. Great Western Packing Co.,* 21 Cal.2d 636, 638 [134 P.2d 242]; *Eichler Homes of San Mateo, Inc. v. Superior Court,* 55 Cal.2d 845, 847 [13 Cal.Rptr. 194, 361 P.2d 914].) 'The cause of action is to be distinguished from the remedy which is the means by which the obligation or the corresponding action is effectuated, and also from the relief sought.' (*Smith v. Minnesota Mut. Life Ins. Co., supra,* p. 590.) Accordingly, if the action is brought to enforce a single right violated by the defendant, the complaint states but one cause of action regardless of the number of types of relief sought *and notwithstanding that it alleges several theories of recovery.* (*Shell v. Schmidt, supra,* p. 291; *Merlino v. West Coast Macaroni Mfg. Co.,* 90 Cal. App.2d 106, 115 [202 P.2d 748].) Consonant with this latter principle is the rule that 'All damages arising from a single wrong, though at different times, make but one cause of action.' (*Hall v. Susskind,* 109 Cal. 203, 209 [41 P. 1012]; *Sanders v. Allen,* 83 Cal.App.2d 362, 366-367 [188 P.2d 760].)" (Emphasis added.)

In the instant case, plaintiffs seek damages for injuries arising as a result of alleged wrongful conduct on the part of the defendant employees of the County. These damages are sought on a number of different theories. But, notwithstanding that the complaints allege several theories of recovery, they each state but one cause of action under California law. If the plaintiffs

can prevail upon any one of these theories, and if the defendant employees can be shown to have been acting within the scope of their employment, the County is vicariously liable under §815.2(a).

Support for the position urged by plaintiffs can also be found in another provision of the Tort Claims Act. Section 995, Cal. Gov't. Code, obligates the County to provide for the defense "of *any* [emphasis added] civil action or proceeding" brought against the employee "on account of an act or omission in the scope of his employment as an employee of the public entity" if the employee requests such assistance. *Cf. Sinclair v. Arnebergh*, 224 Cal.App.2d 595, 597-598 [36 Cal.Rptr. 810] (1964). In the instant cases counsel for the County are also counsel for the employee defendants.

The legislative history of the Tort Claims Act further supports plaintiffs' position. When the Tort Claims Act was being considered, the California Law Revision Commission that had proposed the legislation submitted a report entitled *A Study Relating to Sovereign Immunity* published in 5 Cal. Law Revision Com., Reports, Recommendations and Studies (1963). With respect to the precise question involved, the report noted:

> "*The issue relevant to the present study, of course, is whether public entities, notwithstanding their immunity from direct liability under the Civil Rights Act, should assume financial responsibility* (whether through payment of insurance premiums to protect their personnel, or through assumption of payment of judgments against such personnel) *for violations by their police officers of that Act.* By analogy to suggestions of-

fered earlier, *it is believed that consideration should be given to adoption of statutory provisions, . . . under which public entities in California would be required to assume ultimate financial responsibility for such torts of their police officers,* except where they acted through malice, fraud, corruption or with wrongful intent." *Id.* at 455. (Emphasis added.)

Subsequent to the enactment of the Tort Claims Act, Professor Arvo Van Alstyne, who is one of the leading commentators on the subject of the Tort Claims Act, observed:

"It is surely arguable, however, that a civil rights action can be maintained against a public entity in California, in view of the statutory declaration here that public entities are liable for injuries that are actionable against their employees. Govt C §815.2(a). But public entities when so sued may be permitted to assert any immunities recognized by state law (see, *e.g.*, Govt C §844.6), for *Monroe* seems to exclude public entities from the purview of the federal Civil Rights Act for the reason that (and thus, perhaps, only to the extent that) traditional concepts of sovereign immunity as recognized by state law were intended to be left undisturbed by Congress. *To the extent that state law, as in California, admits liability of public entities for the torts of their employees, the reasons for limiting the application of §1983 to public employees no longer are persuasive.*" Van Alstyne, California Government Tort Liability, §7.8, at 291-292 (CEB 1964). (Emphasis added.)

Therefore, given the facts that (i) both before and after the enactment of the Tort Claims Act its authors have urged that it extend to Civil Rights Acts liability of public employees, (ii) the Tort Claims Act itself seems to encompass such liability, (iii) California law would clearly hold the County liable on a judgment against the individual defendants on the pendent state law claims which arise from the identical conduct complained of in the federal claims, *Scruggs v. Haynes*, 252 Cal.App.2d 256 [60 Cal.Rptr. 355] (1967), and (iv) there is no authority indicating any contrary intent, plaintiffs submit that California has provided a cause of action against its public entities when the underlying liability of the public employee is predicated upon a Civil Rights Acts violation. Thus, in assuming federal jurisdiction over the County this court would not be creating a new cause of action nor violating the spirit of *Monroe* by holding that a federal court could impose that state-created liability upon the County. Such result, moreover, would be consistent with the general policy in California concerning the Tort Claims Act. For, as noted in *Larson v. City of Oakland*, 17 Cal.App.3d 91, 97-98 [94 Cal.Rptr. 466] (1971):

> "In connection with governmental tort immunities, the Supreme Court has announced that liability is the rule, immunity is the exception. (*Johnson v. City of Pacifica* (1970) 4 Cal.App.3d 82, 85, 89 [84 Cal.Rptr. 246].) . . .
>
> "It is significant, perhaps, that the rule where immunities are concerned is for strict construction; not for judicial definition, to enlarge immunities."

The only argument offered by the County in the court below in opposition to this analysis of California

law was that a "Pandora's Box of extraneous issues" would result. Yet, in point of fact the very issues which the County claims would be added to the cases if it were made a party defendant are either totally irrelevant or now already involved irrespective of the County's status as a party defendant. This is because the plaintiffs' cases against the County's employees are predicated not only upon the Civil Rights Acts, but also, under pendent jurisdiction, upon California law.

In order to maintain an action against these employee defendants on the state law claims certain state law prerequisites must be met. For example, §950.2, Cal. Gov't. Code, provides in pertinent part:

> "[A] cause of action against a public employee or former public employee for injury resulting from an act or omission in the scope of his employment as a public employee is barred if an action against the employing public entity for such injury is barred under Part 3 (commencing with Section 900) of this division or under Chapter 2 (commencing with Section 945) of Part 4 of this division. This section is applicable even though the public entity is immmune [sic] from liability for the injury."

In commenting upon this provision, the California Law Revision Commission stated:

> "This amendment makes it clear that suit against a public employee or former employee is barred when a suit against the entity is barred (1) by failure to present any claim at all or (2) by presenting a claim that is insufficient, too late or for any other reason inadequate to support an action against the employing public entity. . . .

Likewise, if suit against a public entity is barred by the applicable statute of limitations or by any other provision in Chapter 2 of Part 4 dealing with actions against public entities, suit against the public employee or former employee is also barred.

"The addition of the last sentence to this section eliminates an existing ambiguity by providing that the presentation of a claim to the employing public entity is a prerequisite to suit against an employee notwithstanding the fact that the applicable substantive law may declare the entity to be immune from liability for the injury. Because the employing public entity is financially responsible for judgments against its employees (see Section 825), the presentation of a claim is required in all cases." West's Annotated California Codes, Vol. 32 at 382-383 (1966).

Thus, the County's arguments concerning the inclusion of instructions relating to California Tort Claims Act procedural requirements and separate statutes of limitations are wholly without merit since the same kinds of instructions will have to be given on plaintiffs' pendent state law claims irrespective of whether the County is a party defendant.

Moreover, even though the California Tort Claims Act statute of limitations applicable to the pendent state law claims against the defendant employees is not applicable to the Civil Rights Acts claims against the employees, *Willis v. Reddin*, 418 F.2d 702, 704-705 (9th Cir. 1969), to the extent that the Civil Rights Acts claims were timely filed under the California Tort Claims Act (which they were herein) there is no reason

why, consistent with California law, vicarious liability for those violations should not be imposed upon the County.

In the final analysis there can be no question of California's right to choose to impose vicarious liability upon its public entities for violations of the Civil Rights Acts committed by their employees. That California may choose to condition such vicarious liability upon compliance with certain procedures, or upon a limitations period that differs from the limitations period applicable to the federal right against the employees, should in no way affect a federal court's jurisdiction to impose that state-created vicarious liability if the state prerequisites are met. To do so neither circumvents state law nor affects the scope of §1983.

II.

A Federal Court Has the Power to Exercise Jurisdiction Over a Party on a Pendent State Law Claim Even Though Such Party Is Not Involved in the Related Federal Claim.

In this portion of their brief, plaintiffs assume *arguendo* that there is no independent basis of federal jurisdiction over the County; for, if such basis exists then under well-accepted principles of pendent jurisdiction the district court would also have jurisdiction over the County with respect to the pendent state law damage claims. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 [86 S.Ct. 1130, 16 L.Ed.2d 218] (1966).

However, apart from the question of whether federal jurisdiction over the County exists to impose a state-created vicarious liability for violations of the Civil Rights Acts committed by the County's employees, or even whether such vicarious liability exists under Cali-

fornia law, plaintiffs submit that because California law imposes vicarious liability on the County for the state law violations of its employees, §815.2(a), Cal. Gov't. Code; *Scruggs v. Haynes*, 252 Cal.App.2d 256 [60 Cal. Rptr. 355] (1967), that the principles inherent in the doctrine of pendent jurisdiction allow the district court the power to exercise jurisdiction over the County with respect to these pendent state law claims. This is true even though there is no independent basis of federal jurisdiction over the County. *See* Note, *U.M.W. v. Gibbs and Pendent Jurisdiction*, 81 Harv. L.Rev. 657, 662 (1968).

Recognition of this concept of pendent jurisdiction has occurred in a number of opinions of the circuit courts of appeals emanating from the decision in *United Mine Workers v. Gibbs, supra.* Those cases are *Leather's Best, Inc. v. S. S. Mormaclynx*, 451 F.2d 800 (2d Cir. 1971); *Astor-Honor, Inc. v. Grosset & Dunlap, Inc.*, 441 F.2d 627 (2d Cir. 1971); *Hatridge v. Aetna Cas. & Sur. Co.*, 415 F.2d 809 (8th Cir. 1969); *Stone v. Stone*, 405 F.2d 94 (4th Cir. 1968); *Connecticut Gen'l Life Ins. Co. v. Craton*, 405 F.2d 41 (5th Cir. 1968); *Jacobson v. Atlantic City Hosp.*, 392 F.2d 149 (3d Cir. 1968); *Wilson v. American Chain and Cable Co.*, 364 F.2d 558 (3rd Cir. 1966).

In viewing this post-*Gibbs* trend of decisions, it is significant to note that joinder of a pendent party was accomplished in a number of different circumstances. They ranged from joinder of a pendent party defendant in a variety of federal question cases (*Leather's Best, Astor-Honor* and *Connecticut Gen'l Life Ins. Co.*) to joinder of such a defendant in diversity cases (*Stone* and *Jacobson*) to joinder of pendent party plaintiff in diversity cases (*Hatridge* and *Wilson*). Thus, at this

stage of the concept's development it can be said that it is not unique to any one particular type of case.

Exemplifying the kind of analysis used to accomplish pendent party joinder are the following observations from *Astor-Honor*, which involved the question of whether a party who was not named as a defendant in the plaintiff's federal copyright law claims arising under 28 U.S.C. §1338(a) could still be joined on an alleged unfair competiton claim under 28 U.S.C. §1338(b). While the court ultimately decided the matter upon a liberal reading of §1338(b), it also made the following statements:

> "There are indeed many statements supporting 'the general proposition' enunciated by the district court, notably, for our proposes, that in Wasserman v. Perugini, 173 F.2d 305, 306 (2 Cir. 1949), where this court declared that in the absence of diversity, a federal court did not have jurisdiction over individual defendants on a state tort claim arising from the same accident which was the basis of a separate count against the United States under the Federal Tort Claims Act. However, '[c]ases antedating [United Mine Workers (of America) v. Gibbs, 383 U.S. 715 [86 S.Ct. 1130, 16 L.Ed.2d 218] (1966),] that denied judicial power, i.e., jurisdiction, over the pendent claim are suspect as authority.' 3A Moore, Federal Practice ¶ 18.07[1.-4] (1970). The Gibbs Court described the proper test of pendent jurisdiction as follows, 383 U.S. at 725, 86 S.Ct. at 1138:
>
> The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that

he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole. (Emphasis the court's.)

Although the pendent claim in **Gibbs** ***did not include a party not named in the federal claim, Mr. Justice Brennan's language and the common sense considerations underlying it seem broad enough to cover that problem also.*** See Note, UMW v. Gibbs and Pendent Jurisdiction, 81 Harv.L. Rev. 657, 664 (1968). A plaintiff with claims against three alleged conspirators for the same set of acts 'would ordinarily be expected to try them all in one judicial proceeding,' assuming that all defendants were subject to the process of the court. It would be an unjustifiable waste of judicial and professional time—indeed, a travesty on sound judicial administration—to allow Astor to try its unfair competition claim against Buckley and Bantam in federal court but to require it to prosecute a claim involving precisely the same facts against Grosset 'in a State court a block away.' The absence of any constitutional barrier to entertaining a sufficiently related state claim against a person who was not party to the federal claim was recognized, prior to *Gibbs*, in cases involving compulsory counterclaims under F.R.Civ.P. 13(a), United Artists Corp. v. Masterpiece Productions, Inc., 221 F.2d 213 (2 Cir. 1955), and third party claims under F.R.Civ.P. 14, Dery v. Wyer, 265 F.2d 804 (2 Cir. 1959); Pennsylvania R.R. v. Erie Ave. Warehouse Co., 302 F.2d 843 (3 Cir. 1962). The only post-*Gibbs* court of appeals de-

cision that has been called to our attention which involved the joinder as defendants of persons not parties to the claim supporting federal jurisdiction is Williams v. United States, 405 F.2d 951, 955 (9 Cir. 1969). This presented the same problem as this court had faced, long before *Gibbs*, in Wasserman v. Perugini, *supra*, namely, the joinder of defendants as to whom there was no diversity with a claim for the same injury against the United States under the Federal Tort Claims Act. Although the *Williams* court approved the district court's dismissal of these defendants, we are not at all sure we would agree with this insofar as the decision rested on a general theory of lack of power." 441 F.2d at 629-630. (Emphasis added.)

Taking the *Astor-Honor* analysis, if it has any validity at all it should be, at least, in the context of federal question cases. This is because such cases involve an interpretation and application of federal law, and federal courts are preferable for such purpose. ALI Study of The Division of Jurisdiction Between State and Federal Courts, 164-168 (1969). Some of the reasons advanced by the Study for preferring federal courts for federal question cases are: (i) "a considerable expertness in the interpretation and application of federal law which would be lost if federal question cases were given to the state courts," (ii) a belief "that greater uniformity [of decisions] results from hearing these cases in a federal court," and (iii) a belief "that federal courts are more likely to apply federal law sympathetically and understandingly than are state

courts." In addition to these considerations, the Study observes:

> "Finally, determinations of fact by the state court are subject to at most limited review in the Supreme Court. The federal rights of a party will frequently depend upon what the facts are found to be—*see Prentis v. Atlantic C. L. Co.*, 211 U.S. 210, 228 (1908)—and an appeal, after the case has been shaped by the fact findings of an unsympathetic state court, is as Chief Justice Marshall long ago observed, an 'insecure remedy.' *Osborn v. Bank of the United States*, 9 Wheat. 738, 822 (1824)." *Id.* at 167-168.

These same considerations are obviously not applicable in diversity cases where state law is being interpreted and applied. Yet, even in those types of cases pendent party joinder has been accomplished. *A fortiori* such joinder should be authorized in a federal question case.

However, in spite of this trend of post-*Gibbs* decisions, and the compelling policy considerations for allowing pendent party joinder in, at least, federal question cases, the court below relied entirely upon its earlier decision in *Hymer v. Chai*, 407 F.2d 136 (9th Cir. 1969) and expressly refused to authorize such joinder, stating:

> "However, there are numerous decisions which have reached the opposite conclusion. Moreover, at least one authority has expressed the view that pendent jurisdiction should not be available to bring in a different party on a solely state claim merely because that claim is related to a federal claim against an existing party. Another has

stated that it is by no means certain that pendent jurisdiction permits joinder of a party against whom no federal claims exist. Furthermore, *Hatridge v. Aetna Casualty & Surety Co.*, 415 F.2d 809 (8th Cir. 1969), a case critical of our decision in *Hymer* and strongly relied upon by appellant, has itself been criticized as having 'strained for jurisdiction.'" (Appendix A to the Petition for Writ of Certiorari, at 8-9.)

". . .

"We are thus confronted with a question on which there is an apparent conflict, but on which this court has previously taken a stand in *Hymer*. Having found ample support for the position taken by this court in *Hymer* and having been shown no compelling reason to reverse that stand, we conclude that the court below properly relied on *Hymer* in refusing to exercise jurisdiction over the pendent state claims." (Appendix A to the Petition for Writ of Certiorari, at 10).

Having, thus, clearly reiterated its position in *Hymer*, that federal district courts in the Ninth Circuit do not have the power to consider whether to exercise jurisdiction on a pendent state claim over a party who is not involved in the related federal claim, the court below went on to intimate that the district court, as a matter of discretion, refused to exercise jurisdiction. Plaintiffs submit, however, that the court below erred in attributing to the district court a holding that it would not, as a matter of discretion, hear the state claims against the County when the district court specifically stated in its opinion that in view of *Hymer*, it "is devoid of the power to adjudicate the state claim against

the County; *the issue is not one of discretion.*" (Appendix F to the Petition for Writ of Certiorari, at 23) (Emphasis added).

While the district court intimated it might choose not to hear the state claims, assuming it had discretion to do so, such intimation in no way reflected the district court's final word on the matter. Indeed, the district court in footnote 5 of its order specifically stated that it was not expressing any opinion on what it would do if it were free of the influence of *Hymer* (*Id.* at 27-28). Thus, to uphold the district court's decision on the ground that it exercised its discretion in refusing to take jurisdiction over the County is simply contrary to what the district court did and unfair to plaintiffs. At a minimum, if the lack of power concept in *Hymer* is to be reversed so that the district court might have the power to exercise its discretion, then the matter ought to be sent back to the district court for consideration in the light of that knowledge.

It should also be apparent that in spite of the allusion by the court below to an exercise of "discretion" by the district court, the fact still remains that as a result of the decision by the court below federal district courts in the Ninth Circuit are now without the power to exercise jurisdiction on a pendent state law claim over a party who is not involved in a related federal claim.

In support of its decision, the court below claims to have found "ample support" in *Patrum v. City of Greensburg*, 419 F.2d 1300 (6th Cir. 1969), *cert. denied*, 397 U.S. 990 (1970) and *Wojtas v. Village of Niles*, 334 F.2d 797 (7th Cir. 1964), *cert. denied*, 379 U.S. 964 (1965). But, the fact is that neither can

be said to support the lack of power concept. In *Patrum* the court expressly recognized the power of the district court to join the city and merely upheld the district court's exercise of discretion to refuse to join the City. As for *Wojtas*, it was decided before *Gibbs* and must be viewed accordingly. Thus, only the Ninth Circuit is contrary to the trend of post-*Gibbs* decisions in other circuits which expressly hold that pendent jurisdiction allows for the joinder of parties as well as claims.

Moreover, contrary to the observation of the court below that *Patrum* and *Wojtas* are the only two cases that involved the precise question raised herein, at least one federal district court has recently adopted petitioners' interpretation of *Patrum* and ruled that it did have the power to exercise jurisdiction over the City of Council Bluffs in a fact situation that is indistinguishable from the instant case. *See Eidschun v. Pierce*, 335 F.Supp. 603, 609-614 (S.D. Iowa 1971). Plaintiffs are, of course, of the view that the same kind of analysis that was made in *Eidschun* should be made herein. In addition, *Eidschun* points up that there is even a conflict in decisions on the precise question involved herein.

Given this conflict among the respective circuit courts of appeals, plaintiffs contend that the concern expressed in *Gibbs* in promoting economy, fairness and convenience to the parties, and the holding stated in *Gibbs* that pendent jurisdiction exists whenever (i) the state and federal claims are derived from "a common nucleus of operative fact," and (ii) the claims are such that a plaintiff would "normally be expected to try them all in one proceeding," require the conclusion that pendent jurisdiction allows for the joinder

of parties as well as claims. To hold otherwise would mean that the plaintiffs are compelled to file suit against the County's employees in the federal court under the Civil Rights Acts and pendent state law theories and suit against the County under the state indemnification law in the state court. The plaintiffs must then prove their case against the individual County employees in the federal court and, after obtaining a judgment, again prove their case in the state court sufficiently to collect from the County the judgment obtained in the federal court. That such procedure is less than satisfactory can be seen from the following observations:

> "The disadvantages of such a procedure are clear. Pendent jurisdiction seems to be appropriate in such cases because both claims would normally be tried in one proceeding and would require similar factual showings. For example, to sustain a Section 1983 claim of excessive force and/or false arrest against law enforcement officers a litigant must prove their: (1) assault and/or (2) false arrest, of him, and their (3) employment (or other investigature with power) by a state or local governmental agency. To prove his state law claims against the police officers and their public employer the litigant must prove their: (1) assault and/or (2) false arrest, of him, and their (3) employment by a governmental entity. A litigant seemingly could conclusively demonstrate the substantial identity of his federal and his state law claims by incorporating, *in haec verba,* the allegations of his federal causes of action when setting out his state cause of action. To require parties in cases such as this to relitigate the facts of their federal law claims in state court is to make federalism a

fetish rather than virtue." Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S.Cal.L.Rev. 131, 163 (1972).

Thus, while it may well be that *Hymer* was binding upon the court below,[6] the fact still remains that in view of *Gibbs* and its progeny, its holding that pendent jurisdiction is not available to join parties is questionable as a valid proposition of law today. Moreover, the fact of *Hymer's* inconsistency with the logic of *Gibbs* and its progeny was pointed up in *Hatridge v. Aetna Casualty & Surety Company*, 415 F.2d 809, 817 (8th Cir. 1969), in an opinion written by Mr. Justice Blackmun prior to his appointment to this Court:

> "The Ninth Circuit, however, has refused to follow the Third Circuit precedent and has rejected pendent jurisdiction over a consortium claim. Hymer v. Chai, 407 F.2d 136, 137-138 (9 Cir. 1969). The court felt that it was bound by its earlier decision in an [sic] non-consortium case. Takashi Kataoka v. May Dep't Stores Co., 115 F.2d 521 (9 Cir. 1940), cert. denied, 312 U.S. 700, 61 S.Ct. 739, 85 L.Ed. 1134. . . .
>
> "The Ninth Circuit decision hangs upon a case decided 29 years ago, long prior to *Gibbs* but subsequent to Hurn v. Oursler, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148 (1933), where the doctrine of pendent jurisdiction, although not referred to by that name, was given some vitality. . . .

[6] There appears to be a long-standing rule of the court below that no three-judge panel can overrule another such panel on a similar though not identical issue, *Carson v. United States*, 310 F.2d 558, 561-562 (9th Cir. 1962); *Halprin v. United States*, 295 F.2d 458, 461 (9th Cir. 1961); *Ellis v. Carter*, 291 F.2d 270, 273 n. 3 (9th Cir. 1961); *Upton v. C.I.R.*, 283 F.2d 716, 723 (9th Cir. 1960).

"In any event, we find ourselves in sympathy with the Third Circuit approach for appropriate cases. *It makes good sense; it avoids forum shopping and multiple actions; it tends to reduce costs for litigants; and it avoids the waste of already heavily burdened judicial time.* We feel that a consortium suit, in the light of its stated character under Arkansas law, is ideal for the application of the doctrine. We apply pendent jurisdiction as a supportive ground for our conclusion here." (Emphasis added.)

Plaintiffs submit, therefore, that on the basis of *Gibbs* and its progeny the district court clearly has the power to retain jurisdiction over the County in this case. Moreover, though this Court has not yet passed upon this precise question, it has recently indicated that pendent jurisdiction is important in settling the entire dispute between parties when there is a substantial federal question involved. In *Rosado v. Wyman*, 397 U.S. 397 [25 L.Ed.2d 442, 90 S.Ct. 1207] (1970) the Court decided that even though the federal question had become moot, the district court had the power to decide the state claims involved. The Court felt that federal-state comity was not as important as conserving judicial energy and avoiding multiplicity of litigation. *Rosado* is important because the guidelines for exercising discretion were clarified. Judicial economy and avoidance of multiple litigation seemed to be the primary factors to be considered.

It must also be noted that these same considerations for the utilization of pendent jurisdiction would apply even more strongly if California law is held to impose vicarious liability upon its public entities for violations

of the Civil Rights Acts committed by their employees, but that somehow §1988 was not meant to recognize such state law. Then only general concepts of pendent jurisdiction could be cited to hold the County in the federal court with respect to the Civil Rights Acts claims.

In sum, so that persons in the Ninth Circuit may have the same jurisdictional rights as persons in other circuits, plaintiffs respectfully request that the Court hold that general concepts of pendent jurisdiction do furnish the district court with power to join parties as well as claims, and require the joinder of the County in this case.

III.

The County of Alameda Is a Citizen of California for Diversity Jurisdiction Purposes.

Apart from the jurisdictional issues discussed above, which related to both the *Moor* and *Rundle* cases, *Moor* involves an additional issue of diversity jurisdiction. Specifically, the question raised is whether the County of Alameda is a citizen of California for diversity jurisdiction purposes.

As a general proposition of law it would seem beyond question today that political subdivisions of a state, such as the County of Alameda, are citizens of their respective states for diversity jurisdiction purposes. See *e.g., Illinois v. City of Milwaukee,* .... U.S. .... [92 S.Ct. 1380, 31 L.Ed.2d 712] (1972); *Great No. Life Ins. Co. v. Read,* 322 U.S. 47 [64 S.Ct. 873, 88 L. Ed. 1121] (1944); *Milwaukee County v. M. E. White Co.,* 296 U.S. 268 [56 S.Ct. 229, 80 L.Ed. 220] (1935); *Chicot County v. Sherwood,* 148 U.S. 529 [13 S.Ct. 1695, 37 L.Ed. 546] (1893); *Lincoln County v. Luning,* 133 U.S. 529 [10 S.Ct. 363, 33 L.Ed.

766] (1890); *Cowles v. Mercer County*, 74 U.S. (7 Wall.) 118 [19 L.Ed. 86] (1868). Thus, as recently stated in the unanimous opinion of this Court in *Illinois v. City of Milwaukee, supra:*

> "It is well settled that for the purposes of diversity of citizenship, political subdivisions are citizens of their respective States. Bullard v. City of Cisco, 290 US 179, 78 L Ed 254, 54 S Ct 177, 93 ALR 141; Cowles v. Mercer County, 7 Wall 118, 122, 19 L Ed 86, 87." (31 L.Ed.2d at 720).

This proposition of law concerning the citizenship status of counties has been, with the sole exception of the court below, uniformly followed by the circuit courts of appeals. *See e.g., Brown v. Marshall County, Kentucky*, 394 F.2d 498, 500 (6th Cir. 1968); *Pettibone v. Cook County, Minn.*, 120 F.2d 850 (8th Cir. 1941); *Pearl River County, Miss. v. Wyatt Lumber Co.*, 270 F. 26 (5th Cir. 1921). Thus, in *Brown* the court stated:

> "Also without merit is the county's contention that it is not a 'citizen' of Kentucky for purposes of diversity of citizenship under 28 U.S.C. § 1332. In Cowles v. Mercer County, 74 U.S. (7 Wall.) 118, 19 L.Ed. 86, the Supreme Court held that for purposes of diversity jurisdiction a county is a citizen of the State in which it is located." 394 F.2d at 500.

The only challenge to this long line of federal authorities are the opinions of the court below in this case and in *Miller v. County of Los Angeles*, 341 F.2d

964 (9th Cir. 1965). While the court below predicates these decisions on the mere labeling of the County as a "state agency," an examination of the County's true character shows such labeling to be fallacious. Moreover, district courts in other states within the Ninth Circuit have questioned the view of the court below with respect to California counties and have refused to follow it for their states' counties.

Thus, in *White v. Umatilla County*, 247 F.Supp. 918, 920 (D. Ore. 1965) the court stated:

> "The only challenges to this formidable line of authority are the rather recent Ninth Circuit cases of Miller v. County of Los Angeles, 341 F.2d 964 (9th Cir. 1965) and Lowe v. Manhattan Beach City School District, 222 F.2d 258 (9th Cir. 1955). Since Miller is based entirely on Lowe, we must turn to the latter for the basis of these decisions. There, the District Court held:
>
> '(1) That the record in this cause does not disclose complete diversity of citizenship between the parties (28 U.S.C. § 1332 * * *).' Without analysis, or discussion, the Court of Appeals said:
>
> 'We agree with this conclusion upon the ground that the state is not a citizen and that the school district is a part of the government of the state. * * *'

In support, the court cites such cases as State Highway Comm'n. of Wyoming v. Utah Constr. Co. 278 U.S. 194, 49 S.Ct. 104, 73 L.Ed. 262 (1929); Fowler v. California Toll-Bridge Auth.,

128 F.2d 549 (9th Cir. 1942), involving the same principles as those stated in DeLong, supra. Although I have serious doubts on the subject, it is possible that school districts in California are viewed as true state agencies with full and complete power and authority in the state over the districts. In any event, the authorities cited in support of the decision do not seem to be appropriate.

"In Miller v. County of Los Angeles, supra, our Court of Appeals, without an analysis of the statutory standing, position or powers of the county in question, and relying entirely on Lowe, made the following statement:

> 'On the authority of Lowe, we hold that the allegations of the complaint are not sufficient to invoke the diversity jurisdiction of the District Court under 28 U.S.C. § 1332.'"

"Fortifying the thought that the subject was not adequately briefed to, nor thoroughly analyzed by, the Court of Appeals in either Lowe or Miller, is the fact that no mention is made of federal cases holding to the contrary. Furthermore, the issue before the court in Lowe and Miller was decided in favor of jurisdiction under 28 U.S.C. § 1331. What the court said in each of those cases on §1332, the diversity statute, was completely unnecessary to the decision." (Emphasis added.)

In *Universal Sur. Co. v. Lescher and Mahoney, Arch. & Eng.*, 340 F. Supp. 303 (D. Ariz. 1972) the court also noted the *Lowe* and *Miller* decisions, but then went on to hold, in accordance with the over-

whelming weight of federal authority, that Arizona counties were citizens for diversity jurisdiction purposes. Exemplifying the factors used to reach its decision are the following observations of the court:

"The defendant in the instant case in arguing that an Arizona county is not a separate entity because it is an arm of the state government, relies on some general descriptive statements in Arizona case law to the effect that a county is created by the state for the purpose of government, and a county has only such powers that the state legislature gives it. Defendant concludes from these general descriptions that an Arizona county is not a separate entity but is in fact the 'state' for Eleventh Amendment protection.

"The defendant's analysis completely fails to deal with Arizona legislative intention as revealed by its constitution and statutory provisions which provide that an Arizona county has a separate corporate identity with detailed powers, including the power to sue and to be sued in its own corporate name.

". . .

"Thus, an Arizona county corporation, like any other public or private corporation, is limited to those powers specifically granted it by the state. However, the powers which the State of Arizona has in fact granted its counties clearly envision an autonomous, separate entity, both in a general sense and specifically in relation to those matters which are concerned in this action.

". . .

"To appreciate the decided difference, one need only to compare the power of an Arizona county

to act in its own corporate name for many purposes, including suit, contracts, and taxes; A.R.S §§ 11-201 and 11-202; to build county buildings, A.R.S. § 11-271; to issue bonds, A.R.S. § 11-272; and through its board of supervisors, to exercise '. . . the sole and exclusive authority to provide for the hospitalization and medical care of the indigent sick in the county . . .' A.R.S. § 11-291, as well as all of the broad powers delineated in A.R.S. § 11-251. The county's powers in Arizona even extend to the power to create other municipal corporations, thus the county board of supervisors may declare an '. . . improvement district organized under a corporate name . . .' and 'Thereafter the district shall be a body corporate with the powers of a municipal corporation', A.R.S. § 11-706. Such a corporation created by a county has the power of condemnation. A.R.S. § 11-709, subsec. B, par. 1." *Id.* at 304-305.

In the instant case the County of Alameda has, likewise, sought to rely on a general descriptive statement in California law that counties are "legal subdivisions of the State" (Cal. Const., Art. II, §1) for the proposition that it is not a separate entity from the state. Yet, just as such contention failed in *Universal Sur. Co.*, so too must it fail herein when an analysis of the County's true character is made.

The powers, duties and functions of a county in California are set out in the California Constitution and in a number of provisions of the California codes. Some of the more salient features are as follows (references

are to the California Government Code unless otherwise noted):

— It has "corporate" powers and is a body "corporate and politic," §§23000 and 23003.

— It may sue and be sued, §§945 and 23004(a), and is deemed a "local public entity" for this purpose, §940.4 (in contradistinction to the state and state agencies, §940.6).

— It is deemed and treated as a "local agency" for the purpose of venue in civil actions, Code of Civil Procedure §394(3) (in contradistinction to venue provided for actions against the state and state agencies, Code of Civil Procedure §401).

— It may settle and pay claims and establish claims procedures, §§905, 912.6, 930.2, 935 and 29700-29710, and is deemed a "local public entity" for this purpose, §900.4 (in contradistinction to the state and state agencies, §900.6).

— It is liable for judgments against it, and must levy taxes necessary to pay them, §50171.

— It may receive, manage, hold, sell or otherwise dispose of property, §§23004(b), (d) and 25520-25539.

— It may contract, construct buildings, improvements, and make repairs thereon, §§23004(c) and 25450-25467.

— It may engage in all varieties of utility services and public activities such as acquiring or operating water works, water rights, flood control, water reclamation, rubbish disposal, harbor facilities, airport facilities and libraries, §§25690-26224.

— It must adopt an annual budget and its expenditures are limited to its budget, §§29000-29093 and 29120.

— It may levy and collect taxes, §§23004(e), 25202; and the amount levied must be enough to meet its budget, §§29007, 29012.5 and 29100.

— It may issue general obligation bonds by vote of the electorate of the county, §§29900-29929; and these are obligations to be paid from county taxes, §§29922-29924; and are not obligations of the state (except that a state agency may itself impose and collect the necessary taxes within the county to pay the bond holders if the county fails to do so, §§29925-29927).

— Its boundaries may be altered, or a new county created, or a county seat moved, by proceedings taken within the county or counties concerned, by petition or election, as the case may be, §§ 23200-23690.

— Its government, including its elected governing body, is provided for in its county charter. Cal. Const. Art. 11, §4.

— It may have its charter amended, or a new charter enacted by vote of the electorate of the county (with state legislature ratification, in the case of a new charter) §§23700-23724.

— It may make and enforce ordinances and regulations not in conflict with general laws. Cal.Const. Art. 11, §7.

— It has full legislative powers on all subjects granted by its charter, exercisable through its elected Board of Supervisors; and it may codify its ordinances, §§25207 and 50020-50022.10.

— It elects or appoints, and it pays the salaries of, its governing body and all its officers and employees, §§24200-24204, 25000 and 28000.

It is, thus, obvious that a California county is not part of the government of and is not a department, agency, commission or other instrumentality of the State of California. The State of California has no power to direct or control the affairs or management of a county, or its governing body, officers or employees. The State has no interest in any of the property, funds or assets of a county and has no liability for a county's obligations or liabilities (including the liabilities sought to be asserted by plaintiffs herein).

Further recognizing the separate entity status of a California county is the following statement by the California Supreme Court in *People ex rel. Younger v. County of El Dorado*, 5 Cal.3d 480, 491 n. 12 [96 Cal.Rptr. 553, 487 P.2d 1193] (1971) wherein the court discussed whether a writ of mandate could be issued against a county:

> "Code of Civil Procedure section 1085 states that the writ may be issued to any 'inferior tribunal, corporation, board or person.' While it has been said that counties are not municipal corporations but are political subdivisions of the state for purposes of government (*County of Marin v. Superior Court* (1960) 53 Cal.2d 633, 638-639 [2 Cal. Rptr. 758, 349 P.2d 526]; *County of Los Angeles v. Riley* (1936) 6 Cal.2d 625, 627-628 [59 P.2d 139, 106 A.L.R. 903]; *County of San Mateo v. Coburn* (1900) 130 Cal. 631, 636-637 [63 P. 78,

621]; *Pitchess v. Superior Court* (1969) 2 Cal. App.3d 653, 656-657 [83 Cal.Rptr. 41]), counties have also been declared public corporations or quasi-corporations. (*Pitchess v. Superior Court, supra; Whelan v. Bailey* (1934) 1 Cal.App.2d 334, 339 [36 P.2d 709], overruled on other grounds in *Estate of Miller* (1936) 5 Cal.2d 588, 591 [55 P.2d 491]; *Smith v. Myers* (1860) 15 Cal. 33, 34; 1 McQuillin, Municipal Corporations (3d ed.) §2.46, pp. 496-497.) In view of Government Code section 23003, which provides that a county is 'a body corporate and public,' and section 23004, subdivision (a) of the same code, which states that counties may sue and be sued, we think that a county is sufficently corporate in character to justify the issuance of a writ of mandate to it."

Yet, in spite of this separate corporate character enjoyed by the County of Alameda, the court below simply ignored both California law and the federal authorities cited above and, instead, relied entirely upon its earlier decisions in *Lowe* and *Miller*. Because of this reliance plaintiffs offer the following analysis of *Lowe* and *Miller* as a possible explanation of how they came about and to show that they are not based upon any unique characteristics of California counties.

Both *Lowe* and *Miller* were brought by *pro. per.* plaintiffs. The order dismissing the action in *Lowe* was made by the late District Judge, William C. Mathes, who was known and reputed to be particularly expert on matters of federal jurisdiction. Yet, Judge Mathes, in his own prior decision, *Merced Dredging Co. v. Merced County*, 67 F.Supp. 598, 604 (S.D. Cal. 1946),

specifically upheld diversity of citizenship jurisdiction in a case against the County of Merced, stating:

> "Since plaintiff is a Nevada corporation and defendant County of Merced is a 'citizen' of California within the meaning of Article III, §2, (U.S. Const.) requisite diversity of citizenship exists. Cowles v. Mercer County, 1868, 74 US 118, 122, 7 Wall. 118, 19 L.Ed. 86; Pettibone v. Cook County, 8 Cir., 1941, 120 F.2d 850, 851."

A careful reading of Judge Mathes' order in *Lowe* (Exhibit "A" attached hereto),[7] in the light of his prior *Merced County* opinion and the other authorities so comprehensively cited in his order suggest that his decision in *Lowe* was, perhaps, based on an inadequacy of pleading concept.

Further exemplifying the fact that *Lowe* was, at most, a unique pleading requirements case, is the fact that in *Miller* the court below specifically stated:

> "On the authority of Lowe, we hold that the allegations of the complaint are not sufficient to invoke the diversity jurisdiction of the District Court under 28 U.S.C. §1332." 341 F.2d at 966.

Unfortunately, this pleading requirement analysis seems to have been lost somewhere along the way, with the result being that the court below now cites *Lowe* and *Miller* as a basis for an alleged "rule" of jurisdiction. It might also be noted that the diversity jurisdiction statements made in both *Lowe* and *Miller* were unnecessary since the court below found federal jurisdiction to exist in each of those cases.

---

[7] A certified copy of the opinion will be available at the hearing for the Court's use.

Given, therefore, this origin of the decision by the court below on the status of California counties, and coupling it with the long standing rule of the court below that no three-judge panel can overrule another such panel on a similar though not identical issue (see footnote 6, *supra*), it becomes less difficult to understand how the court below reached its decision herein. Yet, no matter how reached, the decision is incorrect.

In view of the distinct "corporate" status of the County of Alameda, as noted above, logic compels the conclusion that it must be considered a citizen separate from the state for diversity jurisdiction purposes. Indeed, California law fully recognized this distinction between the state as an entity and a county as an entity when it enacted §23011 of the Government Code:

> "The name of a county designated in this chapter is its corporate name, and it shall be designated thereby in any action or proceeding touching its corporate rights, property, and duties."

In view of the above, as well as the overwhelming body of federal law that holds counties to be citizens of their states for diversity jurisdiction purposes, there can be no justification for continuing the fiction that a California county is, in reality, the State. California counties are considered to be separate viable entities having numerous rights and duties like any other person or corporation, and under recent California case authority are even deemed to be "corporate in char-

acter." They should, therefore, be deemed to be "citizens" for diversity jurisdiction purposes.

In sum, plaintiff submits the following statements from *Universal Sur. Co.* as policy considerations by which to be guided:

> "Further, there is no policy reason or comity consideration in broadening the reading of the term 'state' in the Eleventh Amendment in relation to an Arizona county since such a reading would only close a federal forum to a suit which is not barred in the state's own courts in order to provide protection for a form of sovereign immunity which the state by its constitution, statutes, and rules has specifically relinquished.
>
> "Since the State of Arizona has limited its immunity by means of setting up autonomous county corporations amenable to suit, and further, Arizona has generally been a leader in the modern trend to limit its immunity, having abolished sovereign immunity in tort actions, it would be most inappropriate for a federal forum to reverse the trend, albeit indirectly, by enlarging the state's immunity to extend it to a suit against a corporate political body." 340 F. Supp. at 306.

Plaintiff would also suggest that since this issue affects all types of cases which may be brought against a California county, and because the present decision by the court below is so obviously wrong, that even if plaintiffs prevail on their other jurisdictional issues, that the Court also reverse the opinion of the court below on this issue and thus make diversity jurisdiction for political subdivisions uniform among all the circuits.

Conclusion.

For the reasons stated above it is respectfully submitted that the judgment of the court below should be reversed.

Dated: November 22, 1972.

Respectfully submitted,

RONALD M. GREENBERG,
Counsel for Petitioners.

EXHIBIT A.

Order Dismissing Action for Want of Jurisdiction Over the Subject Matter.

United States District Court, for the Southern District of California, Central Division.

Grace Lowe, Plaintiff, v. Manhattan City Beach School, District of Los Angeles County, a political division of the State of California, John L. Miles, John Doe, Richard Doe, and Thomas Doe, Defendants. No. 16646-WM Civil.

Filed: April 14, 1954.

It appearing to the Court:

(1) that the record in this cause does not disclose complete diversity of citizenship between the parties [28 U.S.C. §1332; *Indianapolis v. Chase National Bank,* 314 U.S. 63, 69-70, 76-77 (1941); *Highway Commission v. Utah Co.,* 278 U.S. 194, 200 (1929); *Broadwater etc. Ass'n. v. Montana Power Co.,* 139 F.2d 998, 999 (9th Cir. 1944); *Fowler v. Calif. Toll-Bridge Authority,* 128 F.2d 549 (9th Cir. 1942)];

(2) that there is no claim or cause of action asserted in the complaint which "arises under the Constitution, laws or treaties of the United States" [28 U.S.C. § 1331; *Gully v. First National Bank,* 299 U.S. 109, 112-114 (1936); *Puerto Rico v. Russell & Co.,* 288 U.S. 476, 483-484 (1933); *Hooe v. United States,* 218 U.S. 322, 335-336 (1910); *Scribner v. Straus,* 210 U.S. 352 (1908); *Wade v. Lawder,* 165 U.S. 624 (1897); *Dale Tile Mfg. Co. v. Hyatt,* 125 U.S. 46 (1888); *Republic Pictures Corp. v. Security etc. Bank,* 197 F.2d 767 (9th Cir. 1952)];

(3) that inasmuch as facts requisite to federal jurisdiction [Fed. Rules Civ. Proc., Rule 8 (a)(1), 28 U.S.C.A. 252 (1950)] do not affirmatively appear [*Robertson v. Cease*, 97 U.S. 646, 648-650 (1878); *Ex Parte Smith*, 94 U.S. 455, 456 (1876)], this court of limited jurisdiction [*Shamrock Oil Co. v. Sheets*, 313 U.S. 100, 108-109 (1941)] presumably lacks jurisdiction of the cause [*Bors v. Preston*, 111 U.S. 252, 255 (1884); *Grace v. American Central Ins. Co.*, 109 U.S. 278 (1883); *Turner v. Bank of North America*, 4 Dall. (4 U.S.) 7, 11 (1800); *New York Life Ins. Co. v. Kaufman*, 78 F.2d 398, 400 (9th Cir. 1935)];

IT IS ORDERED upon the Court's own initiative [Fed. Rules Civ. Proc., Rule 12(h), 28 U.S.C.A. at 336] that the action is hereby dismissed for lack of jurisdiction over the subject matter [Fed. Rules Civ. Proc., Rule 12(b)(1), 28 U.S.C.A. at 335].

IT IS FURTHER ORDERED that this dismissal shall not operate as an adjudication upon the merits [Fed. Rules Civ. Proc., Rule 41(b), 28 U.S.C.A. at 380].

IT IS FURTHER ORDERED that the Clerk this day serve copies of this order by United States mail upon the matter for the parties appearing in this cause.

April 14, 1954.

/s/ Wm. C. Mathes
Wm. C. Mathes
United States District Judge

FILE COPY

FILED
DEC 26
MICHAEL RODAK, JR.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-10

DAVID MOOR, et al., *Petitioners,*

vs.

COUNTY OF ALAMEDA, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENTS

PETER W. DAVIS,
RAOUL D. KENNEDY,
CROSBY, HEAFEY, ROACH & MAY,
PROFESSIONAL CORPORATION,
1999 Harrison Street,
Oakland, California 94612,
Counsel for Respondents.

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In the Supreme Court
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OCTOBER TERM, 1972

No. 72-10

DAVID MOOR, et al., *Petitioners,*

vs.

COUNTY OF ALAMEDA, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENTS

STATEMENT OF THE CASE

Plaintiffs Rundle and Moor were injured during attempts by law enforcement officers to suppress a riot which occurred when a mob of some 2,000 persons attacked California Highway Patrol officers in Berkeley, California on May 15, 1969. (A.16; A.33) *Halvonik v. Reagan,* 457 F.2d 311, 312 (9th Cir. 1972).

Plaintiffs first filed timely claims against the County under state law[1] on August 20, 1969. (A.6; A.23) Plaintiffs filed the instant action in the District

[1]California Government Code §§905, 911.2.

Court on February 12, 1970. (A.5; A.22) In August, 1970 plaintiff Rundle filed a parallel action in the State Court. (RRA74)[2]

The District Court and State Court actions were instituted against the County, the County Sheriff, and four deputies. Plaintiffs alleged that deputy Riche shot them and that the other defendants conspired to declare "otherwise lawful assembly and speech as riotous in order to allow defendants . . . to indiscriminately shoot at and otherwise molest said persons." (A.5-10; A.22-27)

In March, 1970, Defendant County answered the District Court actions, *denying* that the Court had jurisdiction over it (A.11; A.28) and asserting that plaintiffs had failed to state a claim against it. (A.14; A.31) All defendants denied plaintiffs' charging allegations and asserted certain affirmative defenses. (A.11-18; A.28-35)

In August and September, 1970, defendant County moved to dismiss in both cases for lack of subject matter jurisdiction. (A.1-2) After extensive briefing and argument, these motions were granted by the District Court (A.2-3) and affirmed by the Ninth Circuit Court of Appeal (Appendix A to petition for Writ of Certiorari).

[2]References to the Record on Appeal in Moor will be designated MRA, and references to the Rundle record will be RRA.

SUMMARY OF ARGUMENT

The question before the Court is whether a federal court without jurisdiction over a state subdivision can "acquire" jurisdiction by the back door, utilizing state law causes of action either through 42 U.S.C. §1988[3] or by the doctrine of pendent jurisdiction.

Plaintiffs do not contest in this appeal the holding of *Monroe v. Pape*, 365 U.S. 167 (1961) that public entities may not be sued under 42 U.S.C. §1983.[4] Instead, plaintiffs ask the Court to expand federal jurisdiction by allowing the District Court to hear state law causes of action against the County.

Firstly plaintiffs attempt to avoid the holding of *Monroe* by proposing incorporation of state law remedies into the 1871 Civil Rights Act[5] by means of Section 1988. However, Congress has said that public entities *may not* be held under that Act for violations by their employees. To defeat the limitation in that Act by reference to some other state law not so limited would be to amend the statute in a manner inconsistent with the intent of Congress and the language of the Act.

Section 1988 allows the Court to look to state damage remedies *not inconsistent* with the 1871 Act. It does not permit the Court to obtain *original jurisdic-*

[3]Originally Section 3 of the Civil Rights Act of 1866, 14 Stat. 27, reenacted in the Act of May 31, 1970, 16 Stat. 144. Hereafter Section 1988.

[4]Act of April 20, 1871, c. 22, §1, 17 Stat. 13. Hereafter Section 1983.

[5]42 U.S.C. §§1983-86. Hereafter 1871 Act.

tion over a new party on a state law cause of action, which is inconsistent with the congressional limitation in the Act. Further, plaintiffs already have perfectly adequate remedies under both federal and state law.

Secondly, plaintiffs attempt to avoid the holding of *Monroe* by asking the Court to do what Congress has declined to do—create a law conferring jurisdiction over a new party on a new state law cause of action by expansion of the doctrine of pendent jurisdiction.

Although the doctrine of separation of powers has perhaps suffered somewhat in recent years, it is still one of the cornerstones of our government. For this Court to expand the jurisdiction of the district Court to new parties, in the absence of congressional authority, would be to ignore this basic tenet.

Congress has not conferred jurisdiction over the County in this case, and the claim of expediency offered is not sufficient to justify such a major shift in the division of power between Congress and the courts. *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966), certainly does not compel such a result.

While one can readily appreciate the reasoning in *Gibbs* that once the District Court has the parties before it, all related issues should be decided, it is a very different thing to force additional parties to litigate additional state law claims in federal court where there is no basis whatsoever for federal jurisdiction over that party. This is particularly true when the party being forced into the federal forum is a subdivision of a state and a defendant.

The question is not what would be most expedient, but what power Congress has given to the federal courts. Plaintiffs' end-justifies-the-means analysis would be suspect in any setting, but is particularly inappropriate where basic questions of separation of powers and federal court jurisdiction are involved.

Finally, plaintiff Moor asserts that a division of the state can be a citizen of itself for purposes of diversity jurisdiction. Regardless of the status of "counties" in other states, the Ninth Circuit has several times examined the question and determined that *California counties* are so closely tied to the state as not to be "citizens" of the state.

Plaintiffs' arguments should be addressed to Congress—not to this Court.

ARGUMENT

I

THE COURT BELOW PROPERLY HELD THAT SECTION 1983 MAY NOT BE UTILIZED TO CIRCUMVENT THE CLEAR INTENT OF CONGRESS THAT PUBLIC ENTITIES MAY NOT BE SUED UNDER THE 1871 CIVIL RIGHTS ACT.

In *Monroe v. Pape,* 365 U.S. 167, 191 (1961), this Court held that Congress clearly intended that public entities not be included within the scope of the 1871 Act.

Plaintiffs say they do not take issue with *Monroe* and further state that they are not attempting to expand the scope of the 1871 Act, but only the juris-

diction of the Court to hear a state law cause of action against the County. Plaintiffs attempt to reach this result by arguing that Section 1988 incorporates within it the entire body of applicable state law and at the same time qualifies as an "Act of Congress" providing for equal rights of citizens, or the protection of civil rights, within the meaning of 28 U.S.C. §1343(3)(4).

At the outset, plaintiffs' attempt to expand jurisdiction of the District Court through Section 1988 is subject to four fatal flaws.

(1) Section 1988 only allows the District Court to use additional damage remedies as to a party over which it already has jurisdiction. The District Court does not have jurisdiction over the County in this case and correctly held that it could not obtain bootstrap jurisdiction through Section 1988.

(2) Section 1988 only allows use of state law remedies consistent with the Act of 1871. Vicarious liability suits against public entities for alleged civil rights violations by their employees are not consistent with the intent and language of the 1871 Act.

(3) Section 1988 only allows use of state law remedies when the laws of the United States do not furnish suitable remedies. In this case, plaintiffs unquestionably have an adequate remedy under federal law.

(4) California law does not provide a *direct* cause of action against public entities for their employees' alleged civil rights violations.

A. Federal Jurisdiction Cannot be Obtained Solely Through Section 1988

First, the language of Section 1988 clearly limits its scope to cases where jurisdiction is independently present when it states:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter . . . shall be . . . enforced [by federal laws, but where federal laws do not furnish suitable remedies the] . . . statutes of the State wherein the court *having jurisdiction* of such civil or criminal cause is held . . . shall be extended to and govern the said courts in the trial and disposition of the cause. . . . [Emphasis added.]

This is not language conferring original jurisdiction on the District Court as to new causes of action against a party not otherwise before the Court. It is language conferring on the District Court the right to supplement federal procedural remedies with state law procedure in cases where the Court already has acquired its basic jurisdiction over the parties. As held by the Court below:

> Finally, we note that section 1988 has not been construed as having created a separate basis for prosecuting claims under the Civil Rights Act, but rather as pertaining to the "forms of process and the scope of remedy." *Pierre v. Jordan,* 333 F.2d 951, 958 (9th Cir. 1964) *cert. denied* 379 U.S. 974 (1965), *rehearing denied,* 380 U.S. 927 (1965). *Cf. Johnson v. New York State Ed. Dept.,* 319 F.Supp. 271, 276 (E.D.N.Y. 1970). Thus, it provides for the adoption of state law

> to cure remedial deficiencies in the federal act, but does not create any right of action in and of itself. [Appendix A to Petition for Writ of Certiorari at Page 7]

This Court has itself previously intimated that Section 1988 was designed to cover remedial deficiencies in the 1871 Act. In *Sullivan v. Little Hunting Park,* 396 U.S. 229, 240 (1969) it was held that:

> This means, as we read Section 1988, that both federal and state rules *on damages* may be utilized. . . .

The same result was also reached in *Post v. Payton,* 323 F.Supp. 799, 802-03 (E.D.N.Y. 1971), where the Court held:

> Section 1988 authorizes in civil rights cases resort to the remedies and procedures of the common law where those of federal law are inadequate. This section does not create an independent cause of action. See In re Stupp, 23 F.Cas. 296 (No. 13,563) (C.C. S.D.N.Y. 1875); Schatte v. International Alliance of Theatrical Stage Employees and Moving Picture Operators of United States and Canada, 70 F.Supp. 1008 (S.D.Calif.C.D. 1947), affirmed per curiam, 165 F.2d 216 (9th Cir. 1948), cert. denied, 334 U.S. 812, 68 S.Ct. 1018, 92 L. Ed. 1743 (1948).

B. State Law Causes of Action Inconsistent with the 1871 Act Cannot be Incorporated Through Section 1988

Second, as held by the Ninth Circuit below, in *Ries v. Lynskey,* 452 F.2d 172 (7th Cir. 1971), in *Wilcher v. Gain,* 311 F. Supp. 754, 755 (N.D.Cal. 1970), and most recently in *Brown v. Ames,* 346 F. Supp. 1173,

1176 (Minn. 1972), the back-door approach to public entity Civil Rights Act liability suggested by plaintiffs is inconsistent with the express limitation in the Act to persons and therefore impermissible.

There can be no doubt that Congress intended to exclude public entities from the operation of the 1871 Act.

In *Monroe v. Pape,* 365 U.S. 167, 191 (1961) Justice Douglas, speaking for the Court, stated:

> The response of Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the *Act of April 20, 1871* was so antagonistic that we cannot believe that the word "person" was used in this particular *Act* to include them. [Emphasis added.]

The Court's analysis is further confirmed by the remarks of Representative Burchard prior to passage of the Act that:

> The General Government cannot punish the State, but the officer who violates his official constitutional duty can be punished under Federal law. What more appropriate legislation for enforcing a constitutional prohibition upon a State than to compel State officers to observe it? Its violations by the State can only be consummated through the officers by whom it acts.

And as noted by the Court in *Monroe* at 190:

Mr. Poland, speaking about the Sherman proposal to make municipalities liable, said:

> "We informed the Conferees on the part of the Senate that the House had taken a stand on that

> subject and would not recede from it; that that section imposing liabilities upon towns and counties must go out or we should fail to agree."

This Court's holding in *Monroe v. Pape*, 365 U.S. 167 (1961) has been criticized on the ground that one of the reasons Congress excluded public entities from operation of the Act is that the power of Congress to do so was considered doubtful, and that the entities were at that time all immune. Plaintiffs here attempt to show that, if the 1871 Congress were somehow transported to the twentieth century, they might have passed a different law. This is not the point. As held in *Ries v. Lynskey*, 452 F.2d 172, 175 (7th Cir. 1971):

> The test here seems to us relatively simple. It is not whether the Congress in 1871 would have included a municipality within the definition of "person" if at the time municipalities generally had not had immunity under the common law of states but rather the test is what Congress meant to do at that time irrespective of the reasons leading to that action. What Congress meant to do, it seems clear from the exposition in *Monroe*, was to legislate that "person" did not include a municipality. As reflected by other portions of the *Carter* opinion the development of the common law calls into play the power of courts to reflect changing philosophies and concepts governing human conduct. A statute, however, in the absence of an integrated flexibility freezes the meaning of the legislative body as of the time of passage. Changes therein should be accomplished by the legislature. Interpretation, but not the rewriting of statutes, is the province of the courts.

Statutory construction should not be the handmaiden of legislative amendment.

This Court also reached the same result in *Monroe v. Pape*, 365 U.S. 167 (1961), when it refused to consider policy arguments that the law should now be changed. Indeed, the futility of second-guessing the reasons for the expressed legislative intent by referring to isolated remarks of individual members of Congress can be seen in Justice Frankfurter's dissent at 365 U.S. 225-37, 248-50.

Conceptually, whether considered as an expansion of Section 1983, or as a new right brought into the 1871 Act by incorporation of state law through Section 1988, the difficulty remains. Congress has said Section 1988 cannot be used to incorporate state law inconsistent with the Act, and at the same time has made it clear that the scope of the Act excludes public entities. Section 1988 cannot, therefore, be used to achieve a result contrary to the limitation in the Act and allow suit against public entities for their employees' alleged violations of Section 1983.*

Since *Monroe* was decided, Congress has several times enacted major and comprehensive civil rights

*Plaintiffs at one point claimed the County had waived its objection to the district court's subject matter jurisdiction but abandoned that position before the Court of Appeals. (Appellants' Opening Brief to the Ninth Circuit Court of Appeals—blue brief at 3). Here, the only jurisdictional issues go to the subject matter jurisdiction of the district court, and in any event there clearly has not been a waiver. *See, e.g., American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1957); *Kriser v. Duran*, 386 F.2d 179, 181 (2d Cir. 1967), *cert. denied*, 390 U.S. 1042; *Martens v. Winder*, 341 F.2d 197 (9th Cir. 1965); *Resnik v. LaPaz Guest Ranch*, 289 F.2d 816 (9th Cir. 1961).

legislation. If Congress had wanted to make public entities liable under the 1871 Act, it would have said so. Having left a consistent and clearly expressed intent to limit the Act dating from 1871, the Court should not expand the Act by judicial interpretation.

As held in *Brown v. Ames*, 346 F. Supp. 1173, 1175 (Minn. 1972):

> It does not lie with this court to hold that Congress should have determined that it had constitutional power or should have adopted some other policy. Since it didn't, this court will not "correct" Congressional action—particularly in the face of a United States Supreme Court decision—and will not treat the law as though Congress had either been mistaken in its prerogative or unwise in its determination not to include municipalities. The *Monroe* doctrine has been on the books for nearly 11 years now, and Congress, aware of the decision, has not seen fit to amend the law. If Congress believes it ought to amend the law—and this court would agree that there may well be wisdom behind the policy to make municipalities liable—then it may do so, or at least provide liability where under State law a municipality has no immunity from suit if timely notice provisions are complied with.

C. Section 1988 May Only Be Utilized Where Remedies Under Federal Law Are Inadequate.

Third, Section 1988 was not designed, and should not be used, for large-scale incorporation of state law tort causes of action. As noted by Justice Harlan in his dissenting opinion in *Jones v. Alfred H. Mayer*

Co., 392 U.S. 409, 460 (1968), Senator Trumbull stated in reference to the 1866 Act:

> If an offense is committed against a colored person simply because he is colored, in a State where the law affords him the same protection as if he were white, this act neither has nor was intended to have anything to do with his case, because he has adequate remedies in the state courts. . . .

In this case plaintiffs not only have adequate state law remedies,[7] but have taken advantage of these remedies by filing claims under state law.

Section 1988 is expressly limited to cases where the laws of the United States are "deficient in the provisions necessary to furnish suitable remedies."

Plaintiffs attempt to avoid this limitation by claiming that if they were to obtain a judgment against the individual defendants, they would not be able to collect. Plaintiffs, however, have failed to offer any facts as evidence to support their assertion *as to the defendants in this case* for the reason that they are unable to do so. In fact, the contrary is true. Should a judgment be rendered against the individual defendants in this case, it will be readily collectible by plaintiffs through California Government Code §825 or by the officers' insurance.

Government Code §825 provides:

> If an employee or former employee of a public entity requests the public entity to defend him against any claim or action against him for an injury arising out of an act or omission occurring

[7] *See, e.g.*, Cal. Govt. Code §§810, et al.

within the scope of his employment as an employee of the public entity and such request is made in writing not less than 10 days before the day of trial, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed.

If the public entity conducts the defense of an employee or former employee against any claim or action, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed; but, where the public entity conducted such defense pursuant to an agreement with the employee or former employee reserving the rights of the public entity not to pay the judgment, compromise or settlement until it is established that the injury arose out of an act or omission occurring within the scope of his employment as an employee of the public entity, the public entity is required to pay the judgment, compromise or settlement only if it is established that the injury arose out of an act or omission occurring in the scope of his employment as an employee of the public entity.

Nothing in this section authorizes a public entity to pay such part of a claim or judgment as is for punitive or exemplary damages. (Added Stats. 1963, c. 1681, p. 3270, §1.)

As alleged by plaintiffs in their brief to this Court the County is conducting the defense of the employees in this case. Under Section 825 the County is thus obligated to pay any compensatory damage judgment for plaintiffs. Further, in answers to interrogatories

filed August 7, 1970, defendant Madigan has informed plaintiffs that he has two policies of insurance and a bond covering his acts of misfeasance in office totaling more than $500,000.[8] Plaintiffs' assertion that the individual defendants are judgment-proof is totally without factual foundation in this case.

D. California Does Not Provide a Direct Action Against Public Entities for Alleged Civil Rights Violations by Its Employees

Fourth, plaintiffs' assertion that California law provides a direct right of action against the County for Section 1983 violations by its employees is disputed. No case has held that such a right of action exists, and the legislative history seems to indicate that it was considered and rejected. Although the California Law Revision Commission recommended consideration of enacting such a law,[9] the Legislature did not do so. What the Legislature did do was reject all public entity liability except that specifically provided in the Tort Claims Act.[10]

The legislative committee comment to Government Code §815 provides in part:

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[8]Plaintiffs, of course, have the burden of proof on sustaining jurisdiction of the district court. *U.S. ex rel. Gittlemacker v. County of Philadelphia*, 413 F.2d 84, 88 (3d Cir. 1969) *cert. denied*, 396 U.S. 1046 (1970). They have totally failed to meet that burden here, and the Court should not even consider their argument that the individual officers are judgment-proof. However, if the Court does choose to consider this point, it should at least be aware of the true facts, although not a part of the record on appeal.

[9]A Study Relating to Sovereign Immunity, 5 Cal. Law Revision Commission Reports, Recommendations and Studies, 455 (1963).

[10]Cal. Govt. Code §§810, et al.

> This section abolishes all comon law or judicially declared forms of liability for public entities, except for such liability as may be required by the state or federal constitution, e.g., inverse condemnation. In the absence of a constitutional requirement, public entities may be held liable only if a statute (not including a charter provision, ordinance or regulation) is found declaring them to be liable . . . [T]he practical effect of this section is to eliminate any common law governmental liability for damages arising out of torts. The use of the word "tort" has been avoided, however, to prevent the imposition of liability by the courts by reclassifying the act causing the injury.

The Legislature then enacted Government Code §825 instead of providing for direct entity liability in federal civil rights cases. Section 825 has the advantage of providing for the employees' defense and payment of judgments against them while still focusing the spotlight on the employees who were involved and retaining the entity's rights against those employees.

A further advantage of the Section 825 approach is that any direct action against the entity would be subject to all the defenses in the Tort Claims Act, although the action against the employee under Section 1983 might not. Cal. Govt. Code §§815, 818, 818.2, 818.4, 818.8, 820.2, 820.4, 821.2, 821.6, 822.2, 844.6, 845.2, 845.4, 845.6, 845.8, and 846 (See attached Appendix). A Van Alstyne, *California Government Tort Liability*, §7.8 at 291-92 (1964). *See, Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971), *cert. granted sub nom.* 404 U.S. 1014 (1972).

The legislative committee comment to Section 815 makes it clear that the immunity provisions will inure to the entity regardless of the statutory basis of liability:

> In the following portions of this division, there also are many sections granting public entities and public employees broad immunities from liability. In general, the statutes imposing liability are cumulative in nature, i.e., if liability cannot be established under the requirements of one section, liability will nevertheless exist if liability can be established under the provisions of another section. On the other hand, under subdivision (b) of this section, the immunity provisions will as a general rule prevail over all sections imposing liability. Where the sections imposing liability or granting an immunity do not fall into this general pattern, the sections themselves make this clear.
>
> Subdivision (b) also makes it clear that the sections imposing liability are subject to the ordinary defenses, such as contributory negligence and assumption of the risk, that are available in tort litigation between private persons.

Although, to a large degree, there is overlap between a tort action under California law and a Section 1983 action, the basis of liability is quite different. They should be kept separate, if for no other reason than to avoid the confusing and contradictory jury instructions which would necessarily result.

In short, California does not provide a direct vicarious liability action against its public entities,

and such an action would not be desirable. Instead, California has provided that the employing entity shall conduct the employee's defense and pay any judgments rendered against him for injuries caused in the scope of his employment.

Section 1988 is therefore not an appropriate vehicle in this case to expand the jurisdiction of the District Court in allowing a state law vicarious responsibility action against the County, premised on alleged Section 1983 violations by its employees.

E. Sound Policy Dictates That Federal Court Jurisdiction Should Not Be Expanded in this Case

In addition, other considerations mitigate against expansion of federal court jurisdiction by this court. As held in *Ries v. Lynskey,* 452 F.2d 172, 175 (7th Cir. 1971):

> We are not convinced that the policy arguments in any event are all one-sided. If a city is to be subject to §1983 liability when a police officer cannot be identified, as suggested by plaintiff, it is not unreasonable to think that the lure of a financially responsible defendant might tend to lessen the number of identifications. Also, the fact that the city might be liable under §1983 might well be accompanied by a lessening of the feeling of individual responsibility on the part of officers who would be aware that they were no longer the prime target in the event of violation of civil rights.

The present system would seem to be the best of both worlds. Because the public entity may not be made a formal party, attention is focused on the in-

dividual officers, which is where it belongs. Experience dictates that being made individual defendants in a law suit has a very sobering effect on police officers, but when only the city or county is named, the effect is not nearly so profound. Further, the trial of the case is simplified without the public entity by elimination of the special defenses which would be applicable under state law should the county be sued directly. Appendix to Petition for Writ of Certiorari at 28.

At the same time, the plaintiffs are assured that any judgments they obtain are collectable through either Government Code §825 or insurance, while the deterrent effect to individual officers is preserved through the sanction of punitive damages.

Plaintiffs' proposal is designed to foster a lack of uniformity among the circuits, and even among the district courts within a circuit. If adopted by this Court, a public entity would or would not be subject to suit in a civil rights action depending on the accident of the extent to which state law provides for public entity vicarious liability.

Further, there is grave doubt as to whether the Eleventh Amendment would permit suit against entities such as the County, and clearly such suit would not be permitted against states.[11] *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299 (1952); *Ford Motor Co. v. Dept. of Treasury of State of Indiana*,

[11]Sovereign immunity can be waived for state court suits only. *Kennecott Copper Corp. v. State Tax Comm.*, 327 U.S. 573 (1946); *Ford Motor Co. v. Dept. of Treasury of State of Indiana*, 323 U.S. 459, 465-66 (1945); *Great Northern Ins. Co. v. Read*, 322 U.S. 47, 54 (1944).

323 U.S. 459, 465-66 (1945). Thus, even in the same district, inconsistent results would necessarily occur depending on whether the officer involved is an employee of the state or a city.

The jurisdiction of the federal courts was carefully limited constitutionally to only those cases or controversies which Congress authorized. U.S. Const. Art. III, §§1, 2. The federal district courts derive their power from Congress and not the Constitution, *Turner v. Bank of North America*, 4 Ball 8, 1 L. Ed. 721 (1800), and statutes conferring jurisdiction on the federal courts are strictly construed. *Healy v. Ratta*, 292 U.S. 263, 270 (1934).

Finally, there has been in recent years a steady trend toward reduction of state sovereign immunity. Most such reductions have been through carefully balanced legislative plans. See e.g., California Tort Claims Act, California Government Code §§810, et al. For this Court to penalize those states which have partially reduced sovereign immunity by making them subject to suit in federal court is both unfair and might dissuade other states from reducing their sovereign immunity.

In view of the fact that plaintiffs here have adequate remedies in both federal and state courts under present law, this Court should not expand the jurisdiction of the district court in this case. The decision of the court below that plaintiffs may not expand the original jurisdiction of the district court by incorporation through Section 1988 of an inconsistent state law cause of action was correct and should be affirmed.

II.

THE COURT BELOW CORRECTLY DECLINED TO ASSUME JURISDICTION OVER THE COUNTY ON A "PENDENT" BASIS WHEN IT HAD NO INDEPENDENT BASIS OF JURISDICTION

As held in *Hubbard v. Ammerman,* 465 F.2d 1169, 1176 (5th Cir. 1972):

> It is elementary, of course, that United States District Courts have only such jurisdiction as conferred by an Act of Congress under Article III §2 of the Constitution.

It is equally well-established that:

> There is no presumption in favor of federal jurisdiction and the basis for such jurisdiction must be affirmatively demonstrated by the party invoking it. [Citations.] The obvious reason for such a rule is that the United States District Courts are courts of limited jurisdiction, "creatures of statute," possessing "only such jurisdiction as the statutes expressly confer, and this jurisdiction must always affirmatively appear." [Citations.] *U.S. ex rel. Gittlemacker v. County of Philadelphia,* 413 F.2d 84, 88 (3d Cir. 1969), *cert. denied,* 396 U. S. 1046 (1970).

A limited exception to that rule was found in *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966), where it was held that although the federal question claim failed at the time of trial, the District Court could still hear a related pendent state law cause of action against the *same defendant.*

Gibbs did not hold, state, or imply that the district court would have original jurisdiction over an ad-

ditional party in the absence of a substantial federal claim against that party.

As stated by Professor Wright in Federal Courts 65 (2d ed. 1970):

> "Pendent jurisdiction," as the term has been used in this section, refers only to the joinder of state and federal claims, though this concept is not unrelated to the doctrine of ancillary jurisdiction applicable in diversity litigation. The pendent jurisdiction concept applies only where the same parties are involved on the state and federal claims. It does not permit bringing in an additional party to respond to a state claim on the ground that that claim is closely related to the federal claim against an existing party.

Accord, Hymer v. Chai, 407 F.2d 136 (9th Cir. 1969); *Williams v. United States*, 405 F.2d 951 (9th Cir. 1969); *Wojtas v. Village of Niles*, 334 F.2d 797 (7th Cir. 1964); *Barrows v. Faulkner*, 327 F. Supp. 1190 (N.D. Okl. 1971); *Tucker v. Shaw*, 308 F. Supp. 1, 9-10 (E.D.N.Y. 1970); *Rosenthal & Rosenthal, Inc. v. Aetna Casualty & Surety Co.*, 259 F. Supp. 624, 630-31 (S.D.N.Y. 1966); *Gautreau v. Central Gulf S.S. Corp.*, 255 F. Supp. 615, 618 (E.D.La. 1966); *Hall v. Pacific Maritime Ass'n*, 281 F. Supp. 54, 61 (N.D.Cal. 1968); and *Ellicott Machine Corp. v. Wiley Mfg. Co.*, 297 F. Supp. 1044, 1046 (Md. 1969).

Plaintiffs here principally rely upon *Hatridge v. Aetna Casualty Surety Co.*, 415 F.2d 809 (8th Cir. 1969) and *Astor-Honor, Inc. v. Grosset & Dunlap, Inc.*, 441 F.2d 627 (2d Cir. 1971).

In *Astor-Honor,* the Court decided the case on the basis that the disputed claim came within 29 U.S.C. §1338(b), holding at pages 630-31:

> While we are thus inclined to the view that a federal court may in its discretion entertain a state claim against a party not named in the federal claim if the state claim meets the *Gibbs,* test, we are not required to decide that issue here.

The statements in the opinion pertaining to pendent jurisdiction are therefore dictum, and the case is not authority for plaintiffs' position here.

In *Hatridge* the parties were already before the Court on a consolidated claim, and the only question was the jurisdictional amount on a claim removed from the state court. First Aetna obtained judgment that its policy did not cover the driver of a bus that overturned injuring Bryans and Hatridge. Next Mrs. Hatridge filed suit in state court for $9,999.99 for loss of consortium. This action was removed to the District Court and Aetna cross-complained against Mrs. Hatridge and the driver. Aetna also filed a declaratory relief action in the District Court against the Hatridges and the driver. The District Court consolidated the actions by consent of the parties and then held for Aetna by summary judgment on the declaratory relief action, refused to remand and dismissed Mrs. Hatridge's case with prejudice. 415 F.2d at 811.

The Court held that jurisdiction of the District Court was properly invoked on the declaratory relief

action, and that the summary judgment was correct. 415 F.2d at 812.

As to Mrs. Hatridge's claim, the Court held that despite the $9,999.99 prayer, the consortium claim could not be separated under state law from the underlying injury claim and that therefore federal court jurisdiction was properly invoked. 415 F.2d at 816.

Finally, as an alternate ground, the Court noted that the District Court had jurisdiction over all of the parties on the declaratory relief action and could accordingly under *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) retain jurisdiction of the state claim against the same parties. Specifically, the Court held at p. 816:

> . . . we have here in Aetna's suit a claim appropriately described as a federal one; an asserted state claim in Mrs. Hatridge's suit; subject matter jurisdiction of the federal claim in the federal court; "a common nucleus of operative fact" for both; and claims which in character are such that they would rightfully be expected to be tried in one judicial proceeding.

Further, the Court in *Hatridge* was primarily concerned with preventing an obvious attempt to forum-shop—a consideration not present here.

Even so, the result reached in *Hatridge* has not been without criticism. As noted in 3A Moore's Federal Practice (Supp.) ¶18.07 (1-2) n.28, the Court "strained for jurisdiction." In *An Over-Extension of the Doctrine of Pendent Jurisdiction: Hatridge v. Aetna Casualty and Surety Company*, 24 Sw.L.J. 537, 542 (1970), another commentator stated:

> The desire for judicial economy and the prevention of forum-shopping is a beneficial quest. However, it must be determined whether these objectives are important enough to alter significantly accepted requirements for entrance to the federal courts. It would appear that federal judges are placed in a confusing position, for they are given the discretionary power to grant pendent jurisdiction in an effort to promote judicial economy, but at the same time are required to adhere to strict congressional requirements for entrance to the federal courts. Using a highly questionable application of precedent, the court in *Hatridge* has seemingly betrayed the federal requisites and left the gates to federal courts unguarded in an apparent effort to create an economical judicial system.

While one can readily appreciate the concern of the Court in *Gibbs*, it is respectfully submitted that the Court should move slowly in expanding the jurisdiction of the district courts.

As one of the few checks on the federal judiciary, our system of government provides that Congress shall define the jurisdiction of the district courts. Article III, §§1, 2; *see*, e.g., *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940); *Chisholm v. Georgia*, 2 Ball 419; *Hubbard v. Ammerman*, 465 F.2d 1169 (5th Cir. 1972). As held in *Healy v. Ratta*, 292 U.S. 263, 270 (1934):

> The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to

> the judiciary sections of the Constitution. See Kline v. Burke Constr. Co., 260 U.S. 226, 233, 234, 67 L.ed. 226, 231, 232, 43 S.Ct. 79, 24 A.L.R. 1077. Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined. See Matthews v. Rodgers, supra (284 U.S. 525, 76 L.ed. 451, 52 S.Ct. 217); compare Elgin v. Marshall, 106 U.S. 578, 27 L.ed. 249, 1 S.Ct. 484.

See also, *Baltimore Contractors v. Bodinger,* 348 U.S. 176, 181 (1955); *Kentucky v. Powers,* 201 U.S. 1, 36 (1906).

Although the interests of expediency and judicial economy are important considerations, it is submitted that they do not justify major expansions of district court jurisdiction *by this court.* If Congress wants to expand the jurisdiction of the district courts to hear related state law claims against parties not otherwise before the court, it may do so.

Furthermore, there are excellent reasons for declining to further expand federal court jurisdiction. As argued in M. Shackman, *The New Pendent Jurisdiction of the Federal Courts,* 20 Stan. L. Rev. 262, 265 (1968):

> The broad standard of pendent jurisdiction announced in *Gibbs,* however, is undesirable because it will place many cases in the federal courts that would otherwise be decided in state courts. The primary objection to reducing the role of

state courts in this area is that state courts have a surer footing on questions of state law than do federal courts. It is true, of course, that *Erie Railroad Company v. Thompkins* has required federal courts to decide state-law questions. But the fact that federal courts now decide such matters does not detract from the fact that state courts are better equipped to do so.

One may object that the desirability of having state courts decide state questions is matched by the desirability of having federal courts decide federal questions. But such an argument ignores the congressional policy of entrusting state courts with concurrent jurisdiction over most federal claims. In addition, channeling more federal questions through the state courts will tend to improve the quality of their adjudication of federal-law defenses in state cases where there is no alternative federal jurisdiction as well as in those cases in which there is concurrent jurisdiction.

There are other good reasons for avoiding federal-court determinations of state law. When a state court makes an error in interpreting federal law it can be corrected by review in the United States Supreme Court, but when a federal court makes an error in interpreting state law there is no state-court review of the federal decision. Similarly, when state courts show a pattern of incompetency or discrimination toward certain federal claims Congress can grant federal courts exclusive jurisdiction of the federal claim and any state claims that may be involved with it. State legislatures, of course, have no similar remedy when federal courts show such a pattern toward state law.

Plaintiffs here have perfectly adequate remedies under state law, and the state courts can hear the Section 1983-85 causes of action. Rather than a judicial expansion of the jurisdiction of the federal courts to state law causes of action, it makes more sense and is equally efficient to hear the entire case in the state courts where jurisdiction already exists. Many issues under the 1871 Act causes of action are decided by state law already[12], and plaintiffs are certainly not in a position to argue that California courts are unfair or incapable of hearing the issues.

In the absence of congressional authority, the jurisdiction of the federal courts should not be expanded. Certainly, there is no compelling reason to do so here.

III

EVEN IF THE COURT BELOW HAD THE POWER TO HEAR THE STATE LAW CAUSES OF ACTION AGAINST THE COUNTY, IT CORRECTLY DECLINED TO DO SO

Both the District Court and Ninth Circuit Court of Appeals had considerable reservation about the desirability of hearing state law claims against the County in this action. The Court of Appeals stated in this regard:

> Thus, the district court also felt as a purely discretionary matter the federal court was an inappropriate forum to hear these state claims. We

[12] *See, e.g., Ker v. California*, 374 U.S. 23, 34, 37 (1963) (lawfulness of arrest determined by state law); *Willis v. Reddin*, 418 F.2d 702 (9th Cir. 1969) (statute of limitations by state law); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (legislative immunity).

agree. [Appendix A to the Petition for Writ of Certiorari at 11.]

Since the District Court had already held it did not have the power to hear the state law claim against the County, its remarks on discretion were necessarily phrased in an advisory sense. Nevertheless, the District Court made it clear that were it free to do so, it would hold as a discretionary matter under the *Gibbs* standard that the state claims against the County should not be heard.

The only other case considering a similar situation, *Patrum v. City of Greensburg,* 419 F.2d 1300 (6th Cir. 1969) *cert. denied* 397 U.S. 990 (1970), reached the same result.

Civil rights suits against officers quelling a riot are complicated enough without interjecting unnecessary issues as to the entity. As held in *United Mine Workers v. Gibbs,* 383 U.S. 715, 726 (1966):

> That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them. [Citations.]
>
> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.

> Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals. . . . Finally, there may be reasons independent of jurisdictional considerations, such as the likelihood of jury confusion in treating divergent legal theories of relief, that would justify separating state and federal claims for trial, Fed Rule Civ Proc 42(b). If so, jurisdiction should ordinarily be refused.

As noted by the District Court Judge who will preside over the trial of this case:

> Moreover, on the issue of the court's *discretion* to adjudicate the pendent claim, there would still be substantial doubts as to whether the state claim should be heard. The present action will be tried to a jury, and with the introduction of a claim against the County under the California Tort Claims Act, with the special defenses available to the County, the case could become unduly complicated. Further, this court would be called upon to resolve difficult questions of California law upon which state court decisions are not legion. [Appendix A to Petition for Writ of Certiorari at 28.]

For example, plaintiffs here claim that state law provides them a direct respondeat superior action against the County. No state or federal court has

ever decided that point. It should be left for the resolution by the courts of California.

On the other hand, there are no compelling reasons here to require the state law causes of action against the County to be heard in federal court. As the County is required to pay any judgment against its employees in this case as an insurer, and as the employees themselves have insurance, the plaintiffs cannot successfully claim that they need the County as a party to have a financially responsive defendant.

Thus, even if the District Court had the power to hear the state law claims against the County, it correctly declined to do so. The judgment should be affirmed.

IV.

DEFENDANT COUNTY IS NOT A "CITIZEN" FOR PURPOSES OF DIVERSITY JURISDICTION

Plaintiff Moor also alleges diversity as a ground for jurisdiction over the County. 28 U.S.C. Section 1332 requires complete diversity among *citizens* of different states.

It is undisputed that a state cannot be a citizen of itself for purposes of diversity jurisdiction. In view of the County's status as a subdivision of the state, it is equally difficult to conceive of how it could also be a "citizen" of itself.

The cases considering "citizenship" of public entities turn on a construction of the particular entity's relationship to the state itself. Where the entity is

simply an arm of the state, it is not a citizen. *DeLong Corp. v. Oregon State Hwy. Comm'n,* 343 F.2d 911 (9th Cir. 1965).

As was held in *O'Neill v. Early,* 208 F.2d 286, 289 (4th Cir. 1953):

> The fact that the state has authorized the defendant school board to sue and be sued is immaterial, since it has not consented to suit in the federal court. Kennecott Copper Corp. v. State Tax Commission, supra, 327 U.S. 573, 66 S.Ct. 745, 90 L.Ed. 862; Ford Motor Co. v. Department of Treasury of State of Indiana, supra, 323 U.S. 459, 465, 65 S.Ct. 347, 89 L.Ed. 389; Great Northern Life Ins. Co. v. Read, supra, 322 U.S. 47, 54, 64 S.Ct. 873, 88 L.Ed. 1121; Southern Ry. Co. v. Query, D.C., 21 F.2d 333, 344. Even if it had consented to be sued in the federal court, jurisdiction is lacking since no federal question is involved and there is no diversity of citizenship in a suit which, although nominally against state agencies and officers, is in reality a suit against a state. State Highway Commission v. Utah Construction Co., 278 U.S. 194, 199-200, 49 S.Ct. 104, 73 L.Ed. 262; State of North Dakota v. National Milling & Cereal Co., 8 Cir., 114 F.2d 777; Kansas City Southern Ry. Co. v. Morley, D.C., 88 F.Supp. 300.

See also, *DeLong Corp. v. Oregon Hwy. Comm'n,* 233 F.Supp. 7, 19 (Ore. 1964) aff'd, 343 F.2d 911, (9th Cir. 1965).

Cases dealing with "counties" and municipalities in other states are not determinative of the issue, since the question is the status of *California's counties.*

In *Miller v. County of Los Angeles,* 364 F.2d 500, 501 (9th Cir. 1966), *cert. denied,* 386 U.S. 990; *Miller v. County of Los Angeles,* 341 F.2d 964 (9th Cir. 1965) and in this case the Ninth Circuit held that counties *in California* are not "citizens" for purposes of diversity jurisdiction.

An analysis of the status of California's counties shows that the Court was undoubtedly correct.

Article II, Section 1 of the California Consitution provides in part:

> (a) The State is divided into counties which are legal subdivisions of the State.

In *County of Los Angeles v. Graves,* 210 Cal. 21, 25 (1930), it was held:

> The counties are mere governmental agencies of the state, and the property entrusted to their governmental management is public property, the proprietary interest in which belongs to the public. If there be a legal title in the county, it is a title held in trust for the whole public. In the absence of constitutional restrictions, the leglislature has full control of the property so held by the counties as agencies of the state. [Citation.]

In *County of Marin v. Superior Court,* 53 Cal. 2d 633 (1960), the California Supreme Court held at 638:

> By the same token *all* property under the care and control of a county is merely held in trust by the county for the people of the entire state. The county is merely a political subdivision of state government, exercising only the powers of the state, granted by the state, created for the pur-

pose of advancing "the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and expressly for the general administration of justice." [Citations.] The county holds all its property, therefore, not just highway easements, as agent of the state. [Citations.]

The cases above cited are unanimous in holding that, *as against the state,* the county has no ultimate interest in the property under its care. In *Reclamation District v. Superior Court, supra,* 171 Cal. 672, 680, for example, the state was allowed to take land that had been used by a county for a courthouse, jail, hall of records, etc., without compensation on the theory that "the county is a mere political agency of the state . . . it holds its property on behalf of the state . . . it has no private proprietary interest in such property as against the state."

As to third parties, however, a different situation exists in that the county stands in the place of the state to the extent that the powers of the state have been delegated to it. For instance, in *County of Sierra v. Butler,* 136 Cal. 547 [69 P. 418], the county was allowed to sue to enjoin the defendant from leaving his debris on the highway against the defendant's claim that the state was the proper party to bring the action as the highway was only held in trust for the state by the county. The court said that as against third parties the county was given the authority to represent the state, and the state was bound by the result of the suit. [Citations.]

It has also been universally held that counties are not "persons" for the purpose of confining jurisdiction on federal courts under Section 1343. *See, e.g. Monroe v. Pape,* 365 U.S. 167 (1961). For the same reasons a county is not a "person," it is not a "citizen." It was never the intent of the framers of the constitution or of the legislature to subvert the principle of state sovereignty to the extent of allowing state governments to be sued in federal court on matters of state law. In fact the contrary intent is clearly expressed in Article 11 and in Section 1332. In the case of private or municipal corporations a strong argument can be made that these are much closer to "citizens" than state government. In the case of California counties, that argument cannot be made. By Constitution, state statute and decision, California counties are an integral arm of the state and no more. As such, they cannot logically or reasonably be considered "citizens" of the state.

The case of *Merced Dredging Co. v. Merced County,* 67 F.Supp. 598 (S.D. Cal. 1946) cited by plaintiff is not contrary authority. In that case the Court made the totally unnecessary statement that the County was a citizen; however, there was no issue in the case involving diversity jurisdiction and the statement was pure dictum. The sole issue in that case was due process of law—a federal question.

Reference should also be made to *United States v. Certain Parcels of Land in Riverside County,* 67 F. Supp. 780, 801 n.16 (S.D. Cal. 1946) where the status

of California counties was carefully considered. There the Court held:

> The rule as to suits against the state applies to each of the counties as agencies of the State. [Citation.]
>
> A county is not a person in any sense; it is not a corporation. It cannot sue or be sued, except where specially permitted by statute, and such permission can be withdrawn or denied at any time the legislature may think proper. [Citation.]
>
> . . . The county government is a part of the state government, which is sovereign and the state government, neither in its general nor local capacity, can be sued by her creditors or made amenable to judicial process, except by her own consent. [Citation.]

Section 1332 must be strictly construed against federal jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950); *Thomson v. Gaskill*, 315 U.S. 442 (1942); *Buell v. Sears, Roebuck and Co.*, 321 F.2d 468 (10th Cir. 1963). All doubts must be resolved against federal jurisdiction. *Healy v. Ratta*, 292 U.S. 263 (1934); *Ogden v. Cox*, 294 F.Supp. 810 (N.D. Ga. 1968).

CONCLUSION

Plaintiffs here seek a judicial expansion of the jurisdiction of the District Court to hear purported state law causes of action.

Such an expansion is both unauthorized by Congress and unnecessary, since plaintiffs already have adequate remedies in both state and federal courts. The judgment of the Court below should be affirmed.

Dated, Oakland, California,
December 19, 1972.

Respectfully submitted,
PETER W. DAVIS,
RAOUL D. KENNEDY,
CROSBY, HEAFEY, ROACH & MAY,
PROFESSIONAL CORPORATION,
Counsel for Respondents.

(Appendix Follows)

Appendix

CALIFORNIA GOVERNMENT CODE

5. Absence of liability for injury in absence of ...: Statutory liability as subject to immunity ...fenses.

...ept as otherwise provided by statute:

A public entity is not liable for an injury, ...er such injury arises out of an act or omission ... public entity or a public employee or any other ...n.

... The liability of a public entity established by ...art (commencing with Section 814) is subject to ...mmunity of the public entity provided by stat... including this part, and is subject to any de... that would be available to the public entity if ...e a private person.

...ded by Stats 1963 ch 1681 § 1.

...8. Absence of liability for exemplary and puni... ...damages.

...withstanding any other provision of law, a pub...tity is not liable for damages awarded under ...n 3294 of the Civil Code or other damages im... primarily for the sake of example and by way ...nishing the defendant.

...ded by Stats 1963 ch 1681 § 1.

§ 818.2. Causes of injury not basis for liability: Adoption or failure to adopt enactment: Failure to enforce law.

A public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law.

Added by Stats 1963 ch 1681 § 1.

§ 818.4. Same: Determination as to issuance, denial, suspension or revocation of license, etc.

A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked.

Added by Stats 1963 ch 1681 § 1.

§ 818.8. Same: Employee's misrepresentation.

A public entity is not liable for an injury caused by misrepresentation by an employee of the public entity, whether or not such misrepresentation be negligent or intentional.

Added by Stats 1963 ch 1681 § 1.

§ 820.2. When employee not liable: Exercise of discretion.

Except as otherwise provided by statute, a public employee is not liable for an injury resulting from

his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.

Added by Stats 1963 ch 1681 § 1.

§820.4. Same: Non-negligent law execution or enforcement: Absence of immunity for false arrest or imprisonment.

A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment.

Added by Stats 1963 ch 1681 § 1.

§821.2. Same: Determination as to issuance, denial, suspension or revocation of license, etc.

A public employee is not liable for an injury caused by his issuance, denial, suspension or revocation of, or by his failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where he is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked.

Added by Stats 1963 ch 1681 § 1.

§821.6. Same: Institution or prosecution of judicial or administrative proceeding.

A public employee is not liable for injury caused by his instituting or prosecuting any judicial or ad-

ministrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause.

Added by Stats 1963 ch 1681 § 1.

§ 822.2. Same: Misrepresentation not constituting actual fraud, etc.

A public employee acting in the scope of his employment is not liable for an injury caused by his misrepresentation, whether or not such misrepresentation be negligent or intentional, unless he is guilty of actual fraud, corruption or actual malice.

Added by Stats 1963 ch 1681 § 1.

§ 844.6. Injury by or to prisoner: Absence of liability of public entity: Exception as to liability of vehicle owners and operators: Exception as to dangerous property conditions: Absence of exoneration of public employee: Payment of judgment, etc., and indemnification of employee: Licensed employee's malpractice.

(a) Notwithstanding any other provision of this part, except as provided in this section and in Sections 814, 814.2, 845.4, and 845.6, a public entity is not liable for:

(1) An injury proximately caused by any prisoner.

(2) An injury to any prisoner.

(b) Nothing in this section affects the liability of a public entity under Article 1 (commencing with Section 17000) of Chapter 1 of Division 9 of the Vehicle Code.

(c) Except for an injury to a prisoner, nothing in this section prevents recovery from the public entity for an injury resulting from the dangerous condition of public property under Chapter 2 (commencing with Section 830) of this part.

(d) Nothing in this section exonerates a public employee from liability for injury proximately caused by his negligent or wrongful act or omission. The public entity may but is not required to pay any judgment, compromise or settlement, or may but is not required to indemnify any public employee, in any case where the public entity is immune from liability under this section; except that the public entity shall pay, as provided in Article 4 (commencing with Section 825) of Chapter 1 of this part any judgment based on a claim against a public employee who is lawfully engaged in the practice of one of the healing arts under any law of this state for malpractice arising from an act or omission in the scope of his employment, and shall pay any compromise or settlement of a claim or action, based on such malpractice, to which the public entity has agreed.

Added by Stats 1963 ch 1681 § 1; Amended by Stats 1970 ch 1099 § 5.

§ 845.2. Same: Failure to provide prison, correctional facility, equipment, personnel, etc.

Except as provided in Chapter 2 (commencing with Section 830), neither a public entity nor a public employee is liable for failure to provide a prison, jail or penal or correctional facility or, if such facility is

provided, for failure to provide sufficient equipment, personnel or facilities therein.

Added by Stats 1963 ch 1681 § 1.

§ 845.4. Absence of liability for interference with prisoner's right to judicial determination as to legality of confinement: Liability for injury caused by interference.

Neither a public entity nor a public employee acting within the scope of his employment is liable for interfering with the right of a prisoner to obtain a judicial determination or review of the legality of his confinement; but a public employee, and the public entity where the employee is acting within the scope of his employment, is liable for injury proximately caused by the employee's intentional and unjustifiable interference with such right, but no cause of action for such injury shall be deemed to accrue until it has first been determined that the confinement was illegal.

Added by Stats 1963 ch 1681 § 1; Amended by Stats 1970 ch 1099 § 6.

§845.6. Absence of liability for failure to furnish prisoner medical care: Exception as to employee acting within scope of his employment failing to take reasonable action: Absence of exoneration where licensed employee guilty of malpractice.

Neither a public entity nor a public employee is liable for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner in his custody; but, except as otherwise provided by Sections 855.8 and 856, a public employee,

and the public entity where the employee is acting within the scope of his employment, is liable if the employee knows or has reason to know that the prisoner is in need of immediate medical care and he fails to take reasonable action to summon such medical care. Nothing in this section exonerates a public employee who is lawfully engaged in the practice of one of the healing arts under any law of this state from liability for injury proximately caused by malpractice or exonerates the public entity from its obligation to pay any judgment, compromise, or settlement that it is required to pay under subdivision (d) of Section 844.6.

Added by Stats 1963 ch 1681 § 1; Amended by Stats 1970 ch 1099 § 7.

§ 845.8. Absence of liability as to prisoner's parole or release: Absence of liability for injury caused by escaping or escaped prisoner.

Neither a public entity nor a public employee is liable for:

(a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release.

(b) Any injury caused by:

(1) An escaping or escaped prisoner;

(2) An escaping or escaped arrested person; or

(3) A person resisting arrest.

Added by Stats 1963 ch 1681 § 1; Amended by Stats 1970 ch 1099 § 8.

§ 846. Absence of liability for failure to make arrest or retain person in custody.

Neither a public entity nor a public employee is liable for injury caused by the failure to make an arrest or by the failure to retain an arrested person in custody.

Added by Stats 1963 ch 1681 § 1.

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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-10

DAVID MOOR, *et al.*,

Petitioners,

vs.

COUNTY OF ALAMEDA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR THE PETITIONERS.

In view of the Court's recent decision in *District of Columbia v. Carter*, ...U.S. ...., 41 U.S.L.W. 4127 (Jan. 10, 1973) (No. 71-564), which reversed the opinion of the D.C. Circuit Court of Appeals, and because the respondents' brief is so filled with unfounded and inaccurate statements, plaintiffs submit the following reply.

I.

Utilization of 42 U.S.C. Section 1988 Herein to Adopt State Law Does Not Conflict With Any Intent of Congress Concerning the Scope of a State's Imposition of Vicarious Liability Upon Its Public Entities.

A. Section 1988's Application Is Dependent Only Upon a Court Having Jurisdiction of a Civil Rights Acts Case.

Building upon a series of erroneous and unfounded premises, defendants have ascribed to 42 U.S.C. §1988

an interpretation that finds no support either in its language or in its legislative history.[1] Thus, defendants' contention that §1988 can only be used for a party over whom a federal court otherwise has jurisdiction under the Civil Rights Acts is wrong. Section 1988 speaks in terms of extending state law to certain civil rights "matters" because the particular Civil Rights statute involved in the "case" is either "not adapted to the object" or is "deficient in the provisions necessary to furnish suitable remedies." Stated otherwise, it is because a federal court has jurisdiction of "such . . . cause" rather than jurisdiction over a party that allows it to utilize §1988.

That there is a conceptual distinction between the term "cause" as used in §1988 and "party" is obvious. This Court long ago in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 112 (1866) stated: "In any legal sense, action, suit, and cause are convertible terms." The Court went on to state that conceptually "cause" related to the right being asserted by a party. Thus, it is the substance of the plaintiffs' Civil Rights Acts claims, or "cause," to which §1988 relates and not to any particular party defendant.

In the instant case, if the substance of the plaintiffs' Civil Rights Acts claims can be made more effective because of a state law that increases the likelihood of recovery upon a judgment then §1988 *compels* the district court to extend that state law into the "cause"

---

[1]An excellent summary of the legislative history of §1988 can be found in *Developing Governmental Liability Under 42 U.S.C. §1983*, 55 Minn. L. Rev. 1201, 1215 n. 68 (1971). After reviewing this legislative history the author concludes that "[t]here was no clear indication of congressional purpose in enacting the statute." *Id.* at 1216.

before it.[3] Such extension is required even if it results in imposing a state-created liability upon a party not otherwise liable under the Civil Rights Acts.

In support of this point, plaintiffs have previously cited and discussed the Court's of Appeals' opinions in *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971) *rev'd. sub nom. District of Columbia v. Carter*, ... U.S. ...., 41 U.S.L.W. 4127 (Jan. 10, 1973) (No. 71-564), as that opinion had not yet been reversed, *Hesselgesser v. Reilly*, 440 F.2d 901 (9th Cir. 1971), and *Lewis v. Brautigam*, 227 F.2d 124 (5th Cir. 1955). However, since *Carter* has now been reversed, albeit on a point of law having no application herein, the continued validity of its analysis of §1988 has become speculative, at best. But, irrespective of *Carter's* continued validity, the fact still remains that there are other cases which have accomplished conceptually what defendants contend, without authority, cannot be accomplished, namely a federal court having jurisdiction to impose a state-created liability in a Civil Rights Acts case solely because of the interaction between state law and §1988.

A recent example of this approach is *McDaniel v. Carroll*, 457 F.2d 968 (6th Cir. 1972), *cert. denied*, ... U.S. ...., 41 U.S.L.W. 3370 (Jan. 8, 1973) (No. 72-338). In *McDaniel*, Tennessee law imposed vicarious liability upon a sheriff and his surety for torts committed by a deputy sheriff in the performance of his official duties, and authorized the imposition of

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[3] Cf., *United States ex rel. Washington v. Chester County Police Dept.*, 294 F.Supp. 1157 (E.D. Pa. 1969), *aff'd. on rehearing*, 300 F.Supp. 1279 (E.D. Pa. 1970), wherein §1988 was used in connection with 42 U.S.C. §1981 to provide a damage remedy by incorporating the remedy available under the common law tort of battery.

both compensatory and punitive damages for such torts. Applying Tennessee law and referring to §1988 and this Court's decision in *Sullivan v. Little Hunting Park*, 395 U.S. 229, 240 [90 S.Ct. 400, 24 L.Ed.2d 386] (1969), the Court of Appeals affirmed the district court's imposition of vicarious liability for punitive damages upon the sheriff and his surety for a violation of the Civil Rights Acts committed by a deputy. Pendent jurisdiction was also referred to as a basis for the decision.

In the light of these cases, as well as extensive comment by legal scholars who have supported the kind of §1988 analysis plaintiffs now urge,[8] plaintiffs submit that there is no basis for restricting §1988's application to the confines suggested by the defendants.

B. State Law Imposition of Vicarious Liability Upon Its Public Entities Is Not Inconsistent With the Civil Rights Acts.

Defendants' inconsistency argument ignores what in fact occurred during the congressional debates on the Sherman Amendment, and attributes to *Monroe v. Pape*, 365 U.S. 167 [81 S.Ct. 473, 5 L.Ed.2d 492] (1961) a holding that is nowhere to be found in the opinion. The defendants' basic premise is that not only did Congress not intend, as a matter of federal law, to impose vicarious liability upon a public entity for violations of the Civil Rights Acts committed by the entity's employees, but that Congress also intended

[8] In addition to the Kates & Kouba article referred to in the Brief for the Petitioners *see generally, A Municipality is a "Person" Under 42 U.S.C. §1983 Where Local Law Has Abolished Sovereign Immunity*, 9 Houston L. Rev. 587 (1972); *Developing Governmental Liability Under 42 U.S.C. §1983, supra*, note 1; Kates, *Suing Municipalities and Other Public Entities Under the Federal Civil Rights Act*, 4 Clearinghouse Rev. 177, 196-199 (1970).

to preclude a state from imposing such vicarious liability as a matter of state law. Analysis of the legislative history of the Sherman Amendment, however, belies that premise.

Plaintiffs have previously shown that to the extent that Congress discussed the question of a federal court imposing a state-created liability, the comments were that such jurisdiction would indeed exist. (Brief for the Petitioners at 15.) Defendants have offered no contrary statements from the Sherman Amendment debates. Moreover, any fair reading of *Monroe* and of the congressional debates surrounding the Sherman Amendment compels the conclusion that all Congress was concerned with, and all that this Court ever indicated Congress was concerned with, was the imposition of municipal liability *by virtue of federal law.*

Thus, the contention that the recognition of state law that imposes vicarious liability upon a public entity for violations of the Civil Rights Acts committed by the entity's employees is inconsistent with the Civil Rights Acts is fallacious. Indeed, if the concept of vicarious liability is consistent with the Civil Rights Acts, and it is according to cases such as *McDaniel* and *Hesselgesser*, then it should make no difference upon whom a state chooses to impose that vicarious liability. To hold otherwise would truly ascribe to Congress something it never intended.

C. The Adequacy of a State Remedy Does Not Preclude the Use of Section 1988 but Rather Compels Its Use.

Defendants' inadequate remedy argument apparently confuses two separate concepts. They are (i) defiant federal laws allowing for §1988 to apply and (ii) adequacy of a state remedy. Of these two concepts,

§1988 is concerned only with the former, and was designed to allow for the recognition of adequate state laws to correct these federal law deficiencies. *Sullivan v. Little Hunting Park*, 395 U.S. 229, 240 [90 S.Ct. 400, 24 L.Ed.2d 386] (1969); *Brazier v. Cherry*, 293 F.2d 401, 409 (5th Cir. 1961). As previously shown, state statutes imposing vicarious liability have been considered appropriate for §1988 adoption.

To the extent that defendants argue, however, that plaintiffs do not need §1988 because they have an adequate state remedy, they are injecting a restriction into §1988 which is inherently inconsistent with its provisions, since §1988 is designed to adopt the "adequate state remedy" into the federal court case. Thus, only the adequacy of state law in an area where federal law is deficient compels the use of §1988.

In addition, merely because a state may have enacted adequate provisions for the protection of its citizens or because a case could have been brought in the state court is no reason for denying a person his choice of a federal forum for the adjudication of his federal constitutional rights. For, as stated in *Zwickler v. Koota*, 389 U.S. 241, 248 [88 S.Ct. 391, 19 L.Ed.2d 444] (1967):

> "In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a stitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn respon-

sibility, equally with the federal courts, '. . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . .,' Robb v. Connolly, 111 US 624, 637, 28 L ed 542, 546, 4 S Ct 544. 'We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum. Stapleton v Mitchell, 60 F Supp 51, 55; see McNeese v Board of Education, 373 US, at 674, note 6, 10 L ed 2d at 627. Cf. Cohens v Virginia, 6 Wheat 264, 404, 5 L ed 257, 291."

The importance of a federal forum for these cases is particularly highlighted when consideration is given to their substantive nature. Significant questions concerning the use of deadly force in crowd control situations and the responsibilities of superior officers for providing adequate training and leadership for deputies upon whom they choose to rely in such situations have been raised. Answers to these questions in a federal constitutional sense will require a considerable amount of interpretation and application of federal law. Given this task, plaintiffs doubt that a state court involved in the multitude of state law issues could even begin to give the kind of extensive analysis furnished by the federal district court in these cases.[4]

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[4] In addition to Appendices D, E and F to the Petition for Writ of Certiorari, at 15, 18 and 21 respectively, a further example of the kind of interpretation and analysis which plaintiffs feel can more realistically result from a federal court is the district court's most recent decision filed in these cases on November 28, 1972. As that decision has not yet been reported, a copy is attached hereto as Exhibit "A."

D. California Law Does Provide for a Direct Vicarious Liability Action Against Its Public Entities.

Perhaps the most remarkable of all of the assertions made by the defendants is the following:

> "In short, California does not provide a direct vicarious liability action against its public entities, and such an action would not be desirable." (Brief for the Respondents at 17-18.)

How the defendants can take that position in view of §815.2(a) of the California Government Code and cases such as *Scruggs v. Haynes*, 252 Cal.App.2d 256, 267-268 [60 Cal.Rptr. 355] (1967) escapes plaintiffs. Moreover, Part 4, Chapter 2 (§§945-949, California Government Code) of the California Tort Claims Act (§§810 *et seq.*, California Government Code) is specifically entitled "Actions Against Public Entities." Section 945 states: "A public entity may sue *and be sued*" (emphasis added). Defendants are, thus, wrong in their direct action contention.

The other rather remarkable assertion made by defendants concerning California law is their apparent concession that §825 of the California Government Code includes within its scope Civil Rights Acts claims against a public entity's employees. Given that concession, there is then no reason for saying that Civil Rights Acts claims are not also within the scope of §815.2(a). While it is true that §825 speaks in terms of defending an employee against "any claim or action" and §815.2 (a) speaks in terms of an employee's actions giving rise to "a cause of action," those terms are obviously substantively identical. Thus, since California law has provided for a direct action against a public entity for wrongs committed by the entity's employees, there is

no basis for concluding that because of California law plaintiffs cannot now sue the County of Alameda.

In addition, because of provisions such as §895.2 of the California Government Code, which provides that a judgment procured against a public entity can serve as the basis for suit against certain other public entities who acted in concert, as was the case with the County of Alameda and other public entities on May 15, 1969, it is essential that plaintiffs obtain a judgment against the County in order to then pursue these other entities.

E. There Are No Policy Considerations Dictating Against the Utilization of Section 1988 Herein.

The only remaining argument advanced by the defendants for not using §1988 herein is their perception of "sound policy" and the possible lack of uniformity that could result.

While the question of whether a public entity should assume vicarious liability for the torts of its employees is a question of policy upon which reasonable persons might differ, the trend since *Monroe v. Pape, supra,* is to impose such liability.[6] Moreover, in view of the enactment of the California Tort Claims Act any dis-

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[6]In *Developing Governmental Liability Under 42 U.S.C. §1983*, 55 Minn. L. Rev. 1201, 1216-1217, n. 75 (1971), the author summarizes the law in this area as follows:

> The common law rule [sovereign immunity] has been modified in some states by statutes and judicial decisions. In the following states the state and its political subdivisions are liable for the torts of their officials:
>
> Arizona: *Stone v. Arizona Hwy. Comm'n*, 93 Ariz. 394, 381 P.2d 107 (1963).
>
> California: Cal. Gov't. Code §§815.2, 818 (1966).
>
> Hawaii: Hawaii Rev. Laws §245A-2 (Supp. 1965).

(This footnote is continued on next page)

cussion of this policy herein is irrelevant since California's decision to impose vicarious liability has already been made.

Iowa: Iowa Code Ann. §§25A1-A20 (1967).

Minnesota: Minn. Stat. §§466.01-.15 (1969).

Nevada: Nev. Rev. Stat. §41.031 (1968).

New York: N.Y. Ct. Cl. Act §8 (1963).

North Carolina: N.C. Gen. Stat. §§143-291, -300.1 (1964).

Washington: Wash. Rev. Code §§4.92.010-4.96.020 (1970).

Wisconsin: *Holytz v. Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

In the following states municipalities are liable for the torts of their officials:

Alaska: Alaska Stat. §09.65.070 (1962).

Florida: Fla. Stat. §95.24 (1967).

Illinois: *Molitor v. Kaneland Community Unit. Dist. No. 302*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

Michigan: *Williams v. Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961).

New Jersey: *McAndrew v. Mularchuck*, 33 N.J. 172, 162 A.2d 820 (1960).

Oklahoma: Okla. Stat. Ann. §1753 (1965).

Virginia: Va. Code Ann. §8-42.1 (1970) (this statute was mistakenly placed in the venue section of the Va. Code; *Markham v. Newport News*, 292 F.2d 711 (4th Cir. 1961).

In the following states municipalities are liable for the torts of their officials to the extent that the municipalities have insurance:

Idaho: Idaho Code Ann. § 41-3505 (1961).

Missouri: Mo. Stat. Ann. §71.185 (1970).

New Hampshire: N.H. Rev. Stat. Ann. § 412.3 (1968).

New Mexico: N.M. Stat. Ann. §5-6-20 (1966).

North Dakota: N.D. Cent. Code §40-43-07 (1968).

Vermont: Vt. Stat. Ann. tit. 29, §1403 (1970).

Wyoming: Wyo. Stat. Ann. §15.1-4 (1965).

In the following states there is no statutory imposition of municipal liability;

Alabama, Arkansas, Colorado, Connecticut, Delaware, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Montana, Nebraska, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah and West Virginia.

As for a potential lack of uniformity, that result is inherent in the use of §1988 in any context. Section 1988, on its face, shows that it was not designed to promote national uniformity but rather to allow supplemental use of state law. Thus, variations already exist with regard to statutes of limitations, *O'Sullivan v. Felix*, 233 U.S. 318 [34 S.Ct. 596, 38 L.Ed. 980] (1914); survival of a cause of action, *Brazier v. Cherry*, 293 F. 2d 401 (5th Cir. 1961); vicarious liability of a sheriff, *Hesselgesser v. Reilly*, 440 F.2d 901 (9th Cir. 1971) and of his surety, *McDaniel v. Carroll*, 457 F.2d 968 (6th Cir. 1972), *cert. denied*, ... U.S. ...., 41 U.S.L.W. 3370 (Jan. 8, 1973) (No. 72-338). Any departure from a policy of uniformity is, therefore, the result of §1988 itself and not the result of any judicial decision to utilize §1988 in the manner intended.

Congress has already balanced the desire to make the Civil Rights Acts as effective as possible against a desire for total national uniformity and has concluded that uniformity remain secondary. The Court should not, therefore, make uniformity paramount at the expense of the Civil Rights Acts' efficacy.

In the final analysis, adoption of the plaintiffs' position on §1988 would not penalize those states which have abrogated sovereign immunity. Rather, it would merely provide another forum for the implementation of the state's policy decision to insure that its citizens are fully redressed for wrongs committed by public employees.

II.

The Policy Considerations Inherent in the Doctrine of Pendent Jurisdiction Justify Its Application, in Appropriate Cases, to a Pendent Party.

To the extent that the defendants base their argument against pendent party joinder upon efforts to factually distinguish a particular case, or upon contentions of adequate state remedy, they avoid the heart of the issue which is whether a federal court has the *power*, pursuant to *United Mine Workers v. Gibbs*, 383 U.S. 715 [86 S.Ct. 1130, 16 L.Ed.2d 218] (1966) and its progeny, to join a party on a pendent state claim that otherwise meets the requirements of *Gibbs* when he is not also a party to the related federal claim. Plaintiffs submit that if the general policy objectives of pendent jurisdiction, as defined in *Gibbs*, are sound, which plaintiffs believe they are, then the conclusion that such power should exist for discretionary application to pendent parties in appropriate cases is warranted. *See generally*, 40 Fordham L. Rev. 400, 409 (1971); 9 Houston L. Rev. 131, 139 (1971).

Further support for this concept of federal judicial power can be seen from the following statements in *Almenares v. Wyman*, 453 F.2d 1075, 1084 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972):

> "The question of the court's power revolves around two bodies of law: on the one hand, there are the traditional statutory jurisdictional requirements; on the other, there are the expanding principles of ancillary and pendent jurisdiction. To be sure, before an action can be brought in the federal courts, the requirements of some jurisdictional statute must be met. Here the named plaintiffs satisfied this under 28 U.S.C. § 1343(3).

> This is sufficient to vest the court with subject-matter jurisdiction not merely over their primary claim, but also over their own pendent claims—all those arising from the "common nucleus of operative facts"—whether against the defendant to the primary claim or another. We see no valid distinction in the *power* of the court to join additional plaintiffs." (Emphasis the court's.)

As for the defendants' efforts to capitalize upon the erroneous attempt of the court below to justify its lack of power holding upon the basis of an alleged "discretionary" ruling by the district court, plaintiffs again submit that any fair reading of the district court's opinion shows that it was not predicated upon an exercise of discretion. (See Brief for the Petitioners at 35-36.)

III.

The County of Alameda Cannot, in Any Sense, Be Equated to the State of California in This Case.

Of all of the positions taken by the defendants, one of the least defensible is their assertion that the County of Alameda is, in reality, an agency of the State of California and, as a result, that the State of California is the "real party in interest." For, when diversity jurisdiction is in question because a defendant claims to be a state agency, "the determinative factor is whether the state is the real party in interest." *Krisel v. Duran*, 386 F.2d 179, 181 (2d Cir. 1967). Plaintiffs submit that no person who has any familiarity with California politics or California law could even begin to argue that, as a matter of form or substance, the State of California is the real party in interest in these cases.

While it is true that certain pre-California Tort Claims Act cases did allude to the fact that a county was a political subdivision of the state and as such held certain property in trust for the people of the entire state, the substance of that kind of controversy has absolutely no relevance to the issue of the status of a county in a suit brought against it in a federal court by a private citizen under the California Tort Claims Act. Much more determinative of a California county's true status is the California Supreme Court's most recent discussion of the subject in *People ex rel. Younger v. County of El Dorado*, 5 Cal.3d 480, 491 n. 12 [96 Cal.Rptr. 553, 487 P.2d 1193] (1971). In that case the corporate nature of a county and its separateness from the State of California were clearly stated.

Finally, to dispel the defendants' self-imposed "grave doubt" concerning the eleventh amendment permitting suit against the County in these cases, reference is made to *Markham v. City of Newport News*, 292 F.2d 711, 716-718 (4th Cir. 1961); *Na-Ja Construction Corporation v. Roberts*, 259 F.Supp. 895, 898-899 (D. Del. 1966); and *Schultz v. Greater New Orleans Expressway Com'n*, 250 F.Supp. 89, 92-94 (E.D. La. 1966), which hold that a state may not immunize its public entities from suit in a federal court once it has authorized suit against its public entities in state courts.

Plaintiffs, therefore, respectfully request the Court to reverse the opinion of the court below on the diversity issue even if plaintiffs prevail on their other points. Otherwise, California counties will be given unwarranted protection from suit in a federal court on almost every conceivable type of diversity case that could be brought.

Conclusion.

For the reasons stated above, and in the Brief for Petitioners heretofore filed, it is respectfully submitted that the judgment of the court below should be reversed.

RONALD M. GREENBERG,
Counsel for Petitioners.

EXHIBIT "A."

Memorandum.

In the United States District Court, Northern District of California.

William Donovan Rundle, Jr., et al., Plaintiffs, v. Frank I. Madigan, et al., Defendants. No. C-70-334 RFP and No. C-70-333 RFP.

Defendants have moved to dismiss or in the alternative for summary judgment on counts 1 and 5 of plaintiffs' amended complaint. These counts allege causes of action based on violations of plaintiffs' civil rights, pursuant to 42 U.S.C. § 1983, 1985(3). Plaintiffs have moved for summary judgment on count 1. In addition to their other contentions, defendants interpose the defense of sovereign immunity against all the acts complained of. The complaint alleges the shooting of plaintiffs by the defendant Riche and asserts claims against the other defendants based on their improper supervision of Riche.

1. *Sovereign Immunity.*

It is important to note at the outset that the Sheriff may not be held *vicariously* liable for the acts of his subordinates. This rule was set down by the Ninth Circuit in *Hesselgesser v. Reilly,* 440 F.2d 901 (9th Cir. 1971). Thus, if the Sheriff is to be held liable for any injuries sustained by the plaintiffs, there must be a showing that the Sheriff *by his own acts* violated one of the Civil Rights Acts in question.

Plaintiffs allege that Sheriff Madigan committed several acts for which he should be held liable.

"a. Failing to adequately plan to deal with the events that occurred in Berkeley on May 15, 1969 in spite of his having been informed by

his own intelligence network well in advance of May 15, 1969, that a riot could be expected if any efforts were made to clear People's Park;

b. Failing to utilize any meaningful criteria or standards in selecting which members of the Alameda County Sheriff's Department would be used in Berkeley on May 15, 1969 in spite of such warning;

c. Selecting deputy sheriffs who were essentially untrained in riot control work, and in some instances, still on a probationary status, to work in Berkeley on May 15, 1969;

d. Issuing riot guns and double-aught buckshot to these essentially untrained and probationary deputies; and

e. Failing to provide any leadership or control of these deputies once the guns and ammunition had been issued."

The defendant Madigan argues that these acts are discretionary and should be protected by the doctrine of sovereign immunity. The Court disagrees. "Discretionary acts" are narrow in scope; for example, "discretionary acts" for the purpose of applying doctrine are narrower in breadth than acts within the scope of authority. Courts have been extremely reluctant to invoke the immunity doctrine in § 1983 cases. *See, e.g., Roberts v. Williams*, 456 F.2d 819 (5th Cir. 1972); *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971).

The defendant's own authority likewise seems to go against him. *Boreta v. Kirby*, 328 F. Supp. 670 (N.D. Cal. 1971), asks: "is the act complained of the result of

a judgment or decision which it is necessary that the Government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability?" In the instant case, the answer to this query is no.

2. *The Section 1985(3) Claim.*

Several elements constitute a § 1985 conspiracy claim. One is that the plaintiffs have been deprived of "equal protection of the law" or of "equal privileges and immunities under the law." Due process violations *alone* do not suffice. Defendants argue that plaintiffs cannot show such a deprivation of equal treatment, citing *Collins v. Hardyman*, 341 U.S. 651, 661 (1950). *See also Snowden v. Hughes*, 321 U.S. 1 (1944), and *Egan v. City of Aurora*, 291 F.2d 706 (1961).

Plaintiffs argue in response that either 1) § 1985 covers due process violations as well; or 2) they *have* made a sufficient showing of discriminatory treatment to withstand defendants' motion for summary judgment. The only case they cite to support their position is *Griffin v. Breckenridge*, 403 U.S. 88 (1971), which reverses *Collins* to the extent that § 1985 now applies to private individuals. Thus, under *Collins*, the plaintiffs must still show some denial of equal protection to make out a § 1983 claim. This they have failed to do. Summary judgment is therefore granted as to all defendants on all claims based on § 1985(3).

3. *Section 1983 Conspiracy Claim.*

There are two questions here. First, can one validly make a *conspiracy* claim under § 1983? Second, if so, are there sufficient issues of fact to defeat either side's motion for summary judgment on this issue?

The Ninth Circuit has ruled that a plaintiff *can* state a civil cause of action for conspiracy under § 1983. *Cohen v. Norris*, 300 F.2d 24 (9th Cir. 1962); *Hoffman v. Halden*, 268 F.2d 280 (9th Cir. 1959). The former case involved a mental patient in a state hospital who was allegedly improperly held in the hospital; the latter case involved a suit against city police officers for unreasonable searches and seizures. The appellate court in both cases held that it was unnecessary to allege a conspiracy to deny the plaintiffs the equal protection of the laws; a conspiracy to deprive them of their civil rights *without due process* was sufficient to state a claim under § 1983. *See also Mizell v. North Broward Hospital District*, 427 F.2d 468 (5th Cir. 1970).

Clearly, conspiracy must still involve an allegation and proof of *purpose*. Plaintiffs argue that the language of *Cohen v. Norris* eliminates the purpose requirement. This Court disagrees. However, although plaintiffs' allegations and facts concerning purpose are skimpy, the requisite purpose may be inferred therefrom. Defendants' motions for dismissal or summary judgment on the §1983 claim are denied.

4. *Section 1983 Tort Claim.*

In claim 5 of their amended complaint, plaintiffs allege that "These acts [of misfeasance by the Sheriff, noted above] were the result of a conscious indifference or disregard of the possible consequences to the plaintiff. . . ." The immediate result of the actions of the sheriff and deputies was the shooting of plaintiffs by officer Riche. Plaintiffs allege that that shooting deprived plaintiffs of their rights to life and liberty without due process of law, in violation of the 14th Amendment. The actual deprivation of a constitutional right

is therefore pleaded, without regard to the actions of Riche's superiors.

Having established that the superiors acted under color of state law, and that the plaintiffs were deprived of a constitutional right, the question becomes, did the actions of the supervisors directly cause that deprivation? Again, the answer seems clear; Riche fired on plaintiffs and inflicted their injury only because, according to plaintiffs, he was placed on duty and given the weapons and instructions to use them by his superiors. In the language of § 1983, the superiors "cause[d] [plaintiffs] to be subjected . . . to the deprivation of . . . rights . . . secured by the Constitution and laws. . . ."

Since *Monroe v. Pape*, 365 U.S. 167 (1961), § 1983 has been read "against the background of tort liability making a man responsible for his acts."[1] Courts have put to rest former notions that relief under § 1983 depended upon proof that the deprivation complained of was the result of the intentional act of the defendant. *See, e.g., Whirl v. Kern*, 407 F.2d 781, 787-89 (5th Cir. 1969), *cert. den.* 396 U.S. 901. Defendants in the instant case argue, however, that at least a "quasi-intent" on the part of the Sheriff and his deputies is required to hold them liable for plaintiffs' injuries under § 1983.

The current of recent decisions in all circuits is against this contention. The Ninth Circuit has not settled the question what degree of culpability is required to state a cause of action under § 1983. In *Williams v. Field*, 416 F.2d 483, 485 (9th Cir. 1969), the court affirmed the dismissal of a complaint from a

[1]The statute predating § 1983 [18 U.S.C. § 242] in terms required *intentional* deprivation; § 1983 omits any "intent".

San Quentin inmate who alleged that the prison authorities failed to protect him from the attack of another prisoner after they had been put on notice that such an attack would take place. In so holding, the court said:

> "Since *Monroe v. Pape*, . . . some courts, like the district court in the instant case, have held that unintentional conduct does not state a claim under section 1983. . . . Another court has indicated that negligent conduct in the appropriate circumstances may support a claim under section 1983. . . . The 'natural consequences' test formulated by Mr. Justice Douglas apparently leaves open the question of the degree of culpability required by section 1983. It may be that negligent conduct, in the appropriate circumstances, will support an action under section 1983. . . . Mere negligent failure to act, standing alone, however, would seem insufficient.
>
> . . .
>
> In addition to an allegation of the requisite degree of culpability, plaintiffs in section 1983 actions must show a violation of federally secured rights."

The Ninth Circuit has not spoken on the question of the requisite degree of culpability since this opinion.

In the Fourth and Fifth circuits, courts have held that negligence alone is sufficient to state a cause of action. However, the facts of the cases decided differentiate, and to some degree belie, these holdings. The outstanding case is *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970). There, the court (Sobeloff, J.) specifically found the reckless use of excessive force by

a police officer seeking to arrest plaintiff. The court held that plaintiff's complaint stated a cause of action under § 1983, and specifically distinguished the "raw abuse of power" present in the case before it from cases of simple negligence. The court held that the requirements of § 1983 were satisfied by "gross and culpable negligence." *Id.* at 1231-32. Simple negligence was not the basis of the decision.

In a very recent Fourth Circuit opinion (Sobeloff, J.), the court holds that simple negligence alone may satisfy § 1983. *McCray v. Maryland*, 456 F.2d 1, 4-5 (4th Cir. 1972). The district court dismissed a civil rights complaint alleging that plaintiff's constitutional rights to access to the courts had been denied by a clerk of the state court who had negligently failed to file plaintiff's writ of habeas corpus. The circuit court reversed and ordered the district court to hear the case. The only authority cited for this holding was the decision in *Jenkins v. Averett*.

In the Fifth Circuit, the courts have granted relief in cases involving the equivalent of "gross negligence." *Roberts v. Williams*, 456 F.2d 819 (5th Cir. 1972), *cert. den.* 404 U.S. 866, is a case quite similar factually to that before this court. The superintendent of a prison farm was held liable for injuries to a prisoner shot by a 'trusty' who was overseeing work on a public road. The trusty's rifle discharged as a result of his negligence. The superintendent was held liable because of his failure properly to train the trusty in the use of firearms and for the specific job he entrusted to him. The precise facts of the failures to train, related to the district judge and noted in the circuit court's opinion, are extremely similar to the allegations directed at the

sheriff and his deputies in this case. *See id.* at 822-23. *See also Anderson v. Nosser*, 456 F.2d 835 (5th Cir. 1972).

Many courts have read the Fourth Circuit decision in *Jenkins* for the proposition that negligence—whether simple or gross—is sufficient culpability to state a cause of action under § 1983. *See Puckett v. Cox*, 456 F.2d 233 (6th Cir. 1972); *Carter v. Carlson*, 447 F.2d 358, 365 & n.20 (D.C. Cir. 1971); *Build of Buffalo, Inc. v. Sedita, et al.*, 441 F.2d 284 (2d Cir. 1971). Other courts as well have been imprecise in finding allegations of negligence sufficient under § 1983. *See Joseph v. Rowlen*, 402 F.2d 367 (7th Cir. 1968); *Daniels v. Van De Venter*, 382 F.2d 29, 31 (10th Cir. 1967); *Stringer v. Dilger*, 313 F.2d 536, 540-41 (10th Cir. 1963).

Fortunately, some courts have been clearer about the distinction drawn in *Jenkins* between simple and gross negligence. The court in *Mullins v. City of River Rouge*, 338 F.Supp. 26 (E.D. Mich. 1972), dismissed the complaint of a plaintiff who was arrested on a city street in winter and taken to the station as a drunk. In fact, he was not drunk and was suffering from severe frostbite. As a result of the neglect of his captors, all his fingers and parts of his thumbs were amputated. He charged the arresting officers with negligence in failing to perceive the frostbite and not rendering him medical attention. The court found that the officers were not in fact negligent, but that even assuming negligence, they could not be held liable under § 1983. The court cited *Jenkins* and drew the distinction between mere negligence and gross negligence. *See also Richardson v. Snow*, 340 F.Supp. 1261 (D. Md. 1972).

This Court's decision whether plaintiffs' allegations state a cause of action under § 1983 should consider the policy behind allowing recovery under the civil rights acts. If the purpose of the acts is to deter individuals acting under color of state law from abusing the rights of others, then the distinction between gross and simple negligence is sensible. There is deterrent value in charging a sheriff, or even a court clerk, with the responsibility for organizing and supervising the affairs of his office so as to insure against even the *chance* that someone's constitutional rights will suffer as a result of his or one of his subordinate's actions. In every case refusing to dismiss a complaint where only negligence is alleged, we have a situation, as we do here, where reasonable precautions can easily avoid catastrophic consequences, delegating authority to wield and discharge a firearm in the presence of people is a very serious matter, demanding a high degree of care. Failure to exercise such care would seem to be gross negligence, which is the same as conscious disregard for the rights of others. The case of the court clerk's mistake, however, is not gross negligence, and it can only be explained if the policy of the statute encompasses the deterrence of patterns or systems of behaviour dangerous to civil rights. The actions alleged in the instant case would fall within this rationale as well.

However, it is likewise possible to view § 1983 as giving a straightforward tort remedy for *any* deprivation of civil rights caused by one acting under color of law, no matter how such deprivation came about. At least one court has taken this view:

> "[U]ntil the legislature provides a substitute scheme for compensating the victims of police

> torts, common law principles and the federal Civil Rights Act guarantee to people like [plaintiff] at least a day in court." *Carter v. Carlson*, 447 F.2d 358, 370 (D.C. Cir. 1971).

If all deprivations that can be proved are to be compensated, then simple negligence should be the rule, leaving, of course, to the actors their defenses as they would have them at common law. *Pierson v. Ray*, 386 U.S. 547 (1967).

This Court need not decide the question whether simple negligence suffices under § 1983 since the complaint in this action alleges circumstances bringing the case within the gross negligence rule of *Jenkins*. Hence, count 5 of the amended complaint should not be dismissed for failure to state a claim. Nor should either side's motions for summary judgment be granted—the facts need developing. Motions to dismiss and for summary judgment denied.

Dated: Nov. 17, 1972.

/s/ Robert F. Peckham
United States District Judge

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MOOR ET AL. *v.* COUNTY OF ALAMEDA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-10. Argued February 27, 1973—Decided May 14, 1973

Petitioners, Moor and Rundle, brought damages actions in the District Court against respondents, several law enforcement officers and Alameda County. Against the County they alleged federal causes of action under the Civil Rights Act, 42 U. S. C. §§ 1983 and 1988, and pendent state claims under the state tort claims statute, the federal, as well as the state, causes of action being grounded on the theory that the County was vicariously liable under state law for the officers' acts. Both petitioners alleged federal jurisdiction under 28 U. S. C. § 1343 and Moor, additionally, on diversity grounds. The County moved to dismiss in each case, contending that, as to the Civil Rights Act claims, it was not a suable "person" under *Monroe* v. *Pape*, 365 U. S. 167; that, absent a claim against it as to which there exists an independent basis of federal jurisdiction, application of the pendent jurisdiction doctrine with respect to the state law claims would be inappropriate; and that in Moor's suit it was not a "citizen" for federal diversity purposes. The District Court granted the motions to dismiss, and the Court of Appeals affirmed. *Held:*

1. Section 1988, as is clear from its legislative history, does not independently create a federal cause of action for the violation of federal civil rights, and to apply that provision here by imposing vicarious liability upon the County would contravene the holding in *Monroe* v. *Pape*, *supra*, and Congress' intent to exclude a State's political subdivision from civil liability under § 1983. Pp. 5–17.

2. Even assuming, *arguendo*, that the District Court had judicial power to exercise pendent jurisdiction over petitioners' state law claims which would require that the County be brought in as a new party defendant, against which petitioners could not state a federally cognizable claim, in addition to the individual de-

Syllabus

fendants against whom they could assert such a claim, the court did not abuse its discretion in not exercising that power in view of unsettled questions of state law that it would have been called upon to resolve and the likelihood of jury confusion resulting from the special defenses to a county available under the state tort claims law. Pp. 17–23.

3. The District Court erred in rejecting petitioner Moor's state law claim against the County, which under California law has an independent status, on the basis of diversity of citizenship, since diversity jurisdiction extends to a State's political subdivision that is not simply the arm or *alter ego* of the State, *Cowles* v. *Mercer County*, 7 Wall. 118. Pp. 23–28.

458 F. 2d 1217, affirmed in part, reversed in part, and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion.

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SUPREME COURT OF THE UNITED STATES

No. 72–10

David Moor et al., Petitioners, *v.* County of Alameda et al.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May 14, 1973]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case raises three distinct questions concerning the scope of federal jurisdiction. We are called upon to decide whether a federal cause of action lies against a municipality under 42 U. S. C. §§ 1983 and 1988 for the actions of its officers which violate an individual's federal civil rights where the municipality is subject to such liability under state law. In addition, we must decide whether, in a federal civil rights suit brought against a municipality's police officers, a federal court may refuse to exercise pendent jurisdiction over a state law claim against the municipality based on a theory of vicarious liability, and whether a county of the State of California is a citizen of the State for purposes of the federal diversity jurisdiction.

In February 1970, petitioners Moor and Rundle[1] filed separate actions in District Court for the Northern District of California seeking to recover actual and

[1] Named as plaintiffs in the *Rundle* case in addition to petitioner William D. Rundle, Jr., were his guardian *ad litem*, William D. Rundle and Sarah Rundle. William D. Rundle and Sarah Rundle are also petitioners here, but for ease of discussion we will refer simply to petitioner Rundle.

punitive damages for injuries allegedly suffered by them as a result of the wrongful discharge of a shotgun by an Alameda County, California, deputy sheriff engaged in quelling a civil disturbance.[1] In their complaints, petitioners named the deputy sheriff, plus three other deputies, the sheriff, and the County of Alameda as defendants. The complaints alleged both federal and state causes of action.

The federal causes of action against the individual defendants were based on allegations of conspiracy and intent to deprive petitioners of their constitutional rights of free speech and assembly and to be secure from the deprivation of life and liberty without due process of law. These federal causes of action against the individual defendants were alleged to arise under, *inter alia*, 42 U. S. C. §§ 1983 and 1984, and jurisdiction was asserted to exist under 28 U. S. C. § 1343.

As to the County, both the federal and state law claims were predicated on the contention that under the California Tort Claims Act of 1963, Cal. Govt. Code § 815.2 (a), the County was vicariously liable for the acts of its deputies and sheriff committed in violation of the Federal Civil Rights Act.[2] The federal causes

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[1] Neither complaint specifically states any claim for equitable relief. Furthermore, the complaints contain no allegations of an ongoing course of conduct, irreparable injury, inadequacy of legal remedy, or other similar allegations generally found in complaints seeking equitable relief. Throughout the course of this litigation the petitioners have given no indication that they seek equitable, as well as legal, relief. Before this Court the petitioners state nothing more than that "[p]laintiffs in both cases seek damages from the defendants . . . ." Brief for Petitioners, at 4. Therefore, the question on which our Brother DOUGLAS hinges his dissent—namely, whether a municipality may be sued for equitable relief under § 1983—simply is not presented here.

[2] Although the County vigorously disputes the petitioners' construction of § 815.2 (a) of the California Tort Claims Act, we do

of action against the County were based on 42 U. S. C. §§ 1983 and 1988,[4] and thus jurisdiction was also alleged to exist with respect to these claims under 28 U. S. C. § 1343. Both petitioners argued before the District Court that it had authority to hear their state law claims against the County under the doctrine of pendent jurisdiction. In addition, petitioner Moor who alleged that he was a citizen of Illinois asserted in his complaint that the District Court also had jurisdiction over his state law claim against the County on the basis of diversity of citizenship.[5]

Initially, the defendants answered both complaints denying liability, although the County admitted that it had consented to be sued.[6] Thereafter, the County, arguing lack of jurisdiction, moved to dismiss all of the claims against it in the *Rundle* suit and to dismiss the federal civil rights claims in the *Moor* suit. The County relied upon this Court's decision in *Monroe* v. *Pape*, 365 U. S. 167, 187–191 (1961), as having resolved that a municipality such as it is not a "person" within the meaning of 42 U. S. C. § 1983, and on this basis alone it considered the civil rights claims against it to be barred. Moreover, in *Rundle*, the County argued that since there was before the District Court no claim against the County as to which there existed an independent basis of federal jurisdiction, it would be inappropriate

not pass upon the parties' conflicting constructions since the question was not decided by either of the courts below.

[4] In their complaints, petitioners also asserted causes of action under 42 U. S. C. §§ 1981 and 1986. But before this Court petitioners have restricted their arguments to §§ 1983 and 1988. Hence, only those sections are now before us.

[5] Petitioner Rundle alleged in his complaint that he was a citizen of California, and therefore he was unable to assert jurisdiction over his state law claims on the basis of diversity of citizenship.

[6] See Answer to Complaint, *Moor* v. *Madigan*, App., at 12; Answer to Complaint, *Rundle* v. *Madigan*, App., at 29.

to exercise pendent jurisdiction over the state law claim against it.

The District Court agreed with the County's arguments and granted the motion to dismiss the *Rundle* suit. It, however, postponed ruling in the *Moor* case pending consideration of possible diversity jurisdiction over the state law claim against the County in that case. Subsequently, the County sought to have the state law claim in *Moor* dismissed on the basis that it was not a citizen of California for purposes of diversity jurisdiction. While this motion was pending, a motion for reconsideration of the order dismissing the County was filed in the *Rundle* case. Following argument with respect to the jurisdictional issues, the District Court entered an order in *Moor* holding that there was no diversity jurisdiction and incorporating by reference an order filed in the *Rundle* case which again rejected petitioners' civil rights and pendent jurisdiction arguments. Upon the request of the petitioners, the District Court, finding "no reason for delay," entered a final judgment in both suits with respect to the County under Fed. Rule Civ. Proc. 54 (b), thereby allowing immediate appeal of its jurisdictional decisions.[1]

The two cases were then consolidated for purposes of appeal, and the Court of Appeals for the Ninth Circuit affirmed the District Court with respect to all three issues raised by the two cases, 458 F. 2d 1217 (1972). In addition to rejecting petitioners' arguments concerning the existence of pendent jurisdiction and diversity jurisdiction over the state law claims, the Court of Appeals disagreed in particular with petitioners' contention that

[1] Subsequent to this decision with respect to the County, the District Court denied the individual defendants' motion to dismiss or, in the alternative, for summary judgment. The District Court also denied petitioners' motion for summary judgment. See Ex. A to Reply Brief for Petitioners.

§ 1988 alone established a federal cause of action against the County for their injuries on the basis of California law which created vicarious liability against the County for the actions of its officers that violated petitioners' federal civil rights. Because of the importance of the questions decided by the Court of Appeals, we granted certiorari. 409 U. S. 841 (1972). For reasons stated below, we now affirm that portion of the Court of Appeals' decision which held that petitioners had failed to establish a cause of action against the County under 42 U. S. C. §§ 1983 and 1988, and that the trial court properly refused to exercise pendent jurisdiction over the state law claims. We reverse, however, its holding that the County is not a citizen of California for purposes of federal diversity jurisdiction.

I

We consider first petitioners' argument concerning the existence of a federal cause of action against the County under 42 U. S. C. § 1988. Petitioners' thesis is, in essence, that under California law the County has been made vicariously liable for the conduct of its sheriff and deputy sheriffs which violates the Federal Civil Rights Acts[1] and that, in the context of this case, § 1988 authorizes the adoption of such state law into federal law in order to render the Civil Rights Acts fully effective, thereby creating a federal cause of action against the County.

Section 1988 reads, in relevant part, as follows:

> "The jurisdiction in civil . . . matters conferred on the district courts by [the Civil Rights Acts] . . . , for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are

[1] See 42 U. S. C. § 1981 *et seq.*

suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies . . . , the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . ."

The starting point for petitioners' argument is this Court's decision in *Monroe* v. *Pape*, 365 U. S. 167 (1961). There the Court held that 42 U. S. C. § 1983, which was derived from § 1 of the Ku Klux Act of April 20, 1971, 17 Stat. 13, was intended to provide private parties a cause of action for abuses of official authority which resulted in the deprivation of constitutional rights, privileges, and immunities.[2] At the same time, however, the Court held that a municipality is not a "person" within the meaning of § 1983. *Id.*, at 187–191. Petitioners do not squarely take issue with the holding in *Monroe* concerning the status under § 1983 of public entities such as the County. Instead, petitioners argue that since the construction placed upon § 1983 in *Monroe* with respect to municipalities effectively restricts the injured party in a case such as this to recovery from the individual defendants, the section cannot be considered to be

[2] Section 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

fully "adapted" to the protection of federal civil rights or is "deficient in the provisions necessary to furnish suitable remedies" within the meaning of § 1988. In petitioners' view, the personal liability of the individual defendants under § 1983 is, as a practical matter, inadequate because public officers are frequently judgment proof.[16] Thus, petitioners contend it is appropriate under § 1988 for this Court to adopt into federal law the California law of vicarious liability for municipalities—that is, the "common law, as modified . . . by . . . statutes of the State wherein the court having jurisdiction of such civil . . . cause is held." Having thus introduced the State's law of vicarious liability into federal law through § 1988, they then assert that there is federal jurisdiction to hear their federal claims against the County under 28 U. S. C. § 1343 (4). Section 1343 (4) grants jurisdiction to the federal district courts to hear any civil action "commenced by any person . . . [t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights . . . ," and § 1988 is, petitioners say, such "an Act of Congress."

Petitioners in this case are not asking us to create a substantive federal liability without legislative direc-

[16] See, e. g., Kates & Kouba, Liability of Public Entities under Section 1983 of the Civil Rights Act, 45 So. Calif. L. Rev. 131, 136–137, 157 (1972); Note, Philadelphia Police Practice and the Law of Arrest, 100 U. Pa. L. Rev. 1182, 1208–1209 (1952); cf. *Lankford v. Gelston*, 364 F. 2d 197, 202 (CA4 1966).

Before this Court the parties have disagreed as to the extent of the individual defendants' personal assets and insurance that might be available to satisfy any favorable final judgment which petitioners might ultimately obtain. See Brief for Respondents, at 15; Tr. of Oral Arg., at 25; *id.*, at 50–51. In light of our conclusion as to the limited function of § 1988 in the scheme of federal civil rights legislation we have no occasion here to pass upon the adequacy of the relief available against the individual defendants.

tion. See *United States* v. *Standard Oil Co.*, 332 U. S. 301 (1947); cf. *United States* v. *Gilman*, 347 U. S. 507 (1954). It is their view, rather, that in § 1988 Congress has effectively mandated the adoption of California's law of vicarious liability into federal law. It is, of course, not uncommon for Congress to direct that state law be used to fill the interstices of federal law.[11] But in such circumstances our function is necessarily limited. For although Congress may have assigned to the process of judicial implication the task of selecting in any particular case appropriate rules from state law to supplement established federal law, the application of that process is restricted to those contexts in which Congress has in fact authorized resort to state and common law.[12] Cf. *Richards* v. *United States*, 369 U. S. 1, 7–8 (1962). Considering § 1988 from this perspective, we are unable to conclude that Congress intended that section, standing alone, to authorize the federal courts to borrow entire causes of action from state law.

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[11] A ready example of such federal adoption of state law is to be found in the Federal Tort Claims Act under which the United States is made liable for certain torts of its employees in accordance with relevant state law. See 28 U. S. C. §§ 1346 (b); 2671–2680. See also *Richards* v. *United States*, 369 U. S. 1, 6–10 (1962). Still other examples are the Outer Continental Shelf Lands Act, 43 U. S. C. §§ 1331–1343, and the provisions of the Assimilative Crimes Act which provides for punishment as federal crimes of acts, committed within the maritime or territorial jurisdiction of the United States, that would have been punishable as a crime under the laws of the State, territory, or district were committed, 18 U. S. C. §§ 7, 11.

[12] Hence, this is a wholly different case from those in which, lacking any clear expression of congressional will, we have been called upon to decide whether it is appropriate to look to state law or to fashion a single federal rule in order to fill the interstices of federal law. See, *e. g.*, *United States* v. *Yazell*, 382 U. S. 341 (1966); *Bank of America National Trust & Savings Assn.* v. *Parnell*, 352 U. S. 29 (1956); *Homberg* v. *Armbrecht*, 327 U. S. 392 (1946); *Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943); *D'Oench, Duhme & Co.* v. *Federal Deposit Insur. Corp.*, 315 U. S. 447 (1942).

First, petitioners' argument completely overlooks the full language of the statute. Section 1988 does not enjoy the independent stature of an "act of Congress providing for the protection of civil rights," 28 U. S. C. § 1343 (4). Rather, as is plain on the face of the statute, the section is intended to complement the various acts which do create federal causes of action for the violation of federal civil rights.[13] Thus, § 1988 specifies that "[t]he jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter [Civil Rights] and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised in conformity with the laws of the United States." But inevitably existing federal law will not cover every issue that may arise in the context of a federal civil rights action.[14] Thus, § 1988 proceeds to authorize federal courts, where federal law is unsuited or insufficient "to furnish suitable remedies," to look to principles of the common law, as altered by state law, so long as such principles are not inconsistent with the Constitution and laws of the United States.

The role of § 1988 in the scheme of federal civil rights legislation is amply illustrated by our decision in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229 (1969).

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[13] See, *e. g.*, 42 U. S. C. §§ 1981, 1982, 1983, 1985. See also 18 U. S. C. §§ 241–245.

[14] One such problem has been the survival of civil rights actions under § 1983 upon the death of either the plaintiff or defendant. Although an injured party's personal claim was extinguished at common law upon the death of either the injured party himself or the alleged wrongdoer, see W. Prosser, Torts 888–891 (4th ed. 1971), it has been held that pursuant to § 1988 state survivorship statutes which reverse the common law rule may be used in the context of actions brought under § 1983. See, *e. g.*, *Brazier* v. *Cherry*, 293 F. 2d 401 (CA5 1961); *Pritchard* v. *Smith*, 289 F. 2d 153 (CA8 1961).

In *Sullivan*, the Court was confronted with a question as to the availability of damages in a suit concerning discrimination in the disposition of property brought pursuant to § 1982 which makes no express provision for a damage remedy.[16] The Court concluded that "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies," *id.*, at 239, and proceeded to construe § 1988, which provides the governing standard in such a case, to mean "that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. . . . The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired." *Id.*, at 240.[16] Properly viewed then, § 1988 instructs federal courts as to what law to apply in causes of actions arising under federal civil rights acts. But we do not believe that the section, without more, was meant to authorize the wholesale importation into federal law of state causes of action [17]—not even one purportedly designed for the protection of federal civil rights.

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[15] Section 1982 provides:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

[16] See also *McDaniel* v. *Carroll*, 457 F. 2d 968 (CA6 1972), and cases cited n. 14, *supra*.

[17] We know of no lower court decision that has held otherwise. To the contrary, the lower federal courts have repeatedly rejected the argument § 1988 independently creates a federal cause of action for the violation of federal civil rights. See *Pierre* v. *Jordan*, 333 F. 2d 951, 958 (CA9 1964); *Otto* v. *Somers*, 332 F. 2d 697, 699 (CA8 1964); *Post* v. *Payton*, 323 F. Supp. 799, 802-803 (EDNY 1971); *Johnson* v. *New York State Education Dept.*, 319 F. Supp. 271, 276 (EDNY 1970), aff'd, 449 F. 2d 871 (CA2 1971), vacated and remanded on other grounds, 409 U. S. 75 (1972); *Dyer* v. *Karuhas*

This view is fully confirmed by the legislative history of the statute. Section 1988 was first enacted as a portion of § 3 of the Civil Rights Act of April 9, 1866, c. 31, 14 Stat. 27. Section 1 of that Act is the source of 42 U. S. C. § 1982, the provision under which suit was brought in *Sullivan*. The initial portion of § 3 of the Act established federal jurisdiction to hear, among other things, civil actions brought to enforce § 1. Section 3 then went on to provide that the jurisdiction thereby established should be exercised in conformity with federal law where suitable and with reference to the common law, as modified by state law, where federal law is deficient.[18] Considered in context, this latter portion

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Abe, 138 F. Supp. 220, 228–229 (Haw. 1956), rev'd on other grounds, 256 F. 2d 728 (CA9 1958); *Schatte* v. *International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada*, 70 F. Supp. 1008 (SD Cal. 1947), aff'd, *per curiam*, 165 F. 2d 216 (CA9 1948); cf. *In re Stupp*, 23 F. Cas. 296, 299 (No. 13,563) (CCSDNY 1875).

Petitioners' reliance in this case upon *Hesselgesser* v. *Reilly*, 440 F. 2d 901, 903 (CA9 1971), and *Lewis* v. *Brautigam*, 227 F. 2d 124, 128 (CA5 1955), is misplaced. In *Hesselgesser*, the Court of Appeals ruled that a sheriff could be held vicariously liable in damages for the wrongful act of his deputy which deprived a prisoner of his civil rights where state law provided for such vicarious liability. The court, to be sure, found authority for the incorporation of state law into federal law in § 1988, but it was acting in the context of a suit brought against the sheriff on the basis of § 1983. Likewise in *Lewis*, where a sheriff was held to be liable for the civil rights violations of his deputies in light of state law which imposed such liability—a decision which also rested apparently upon § 1988, although that section was not specifically cited—the cause of action was properly based on § 1983. These decisions simply do not support the suggestion that § 1988 alone authorizes the creation of a federal cause of action against the County. And here, as discussed below, § 1983 is unavailable as a basis for suit against the County.

[18] As enacted, § 3 reads, in part, as follows:

"That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several

of § 3, which has become § 1988 and has been made applicable to the Civil Rights Acts generally, was obviously intended to do nothing more than to explain the source of law to be applied in actions brought to enforce the substantive provisions of the Act including § 1.[19] To

States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; . . . . The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty."

[19] Following the ratification of the Fourteenth Amendment in 1868, the Act of April 9, 1866, was re-enacted without change in the Act of May 31, 1870, c. 114, § 18, 16 Stat. 144. At the same time, Congress enacted what is now 42 U. S. C. § 1981. See Act of May 31, 1870, c. 114, § 16, 16 Stat. 144. Section 18 of the Act also provided that the provision now contained in § 1981 was to be enforced in accordance with the provisions of the Act of April 9, 1866. Thus, Congress again directed merely that § 1988 would guide courts in the enforcement of a particular cause of action, namely, that created in § 1981. Similarly, when 42 U. S. C. § 1983 was first enacted, it was made "subject to the same rights of appeal, review upon error, and other remedies provided in like cases . . . under the provisions of the act of the ninth of April, eighteen hundred and sixty-six . . . ." Act of April 20, 1871, c. 22, § 1, 17 Stat. 13. Codification saw § 1988 made into § 722 of the Revised Statutes (2d ed. 1878), with the statute being made generally applicable to, *inter alia*, the Civil Rights portion of the Revised Statutes, see §§ 1977–1991.

hold otherwise would tear § 1988 loose from its roots in § 3 of the 1866 Civil Rights Act. This we will not do.

There is yet another reason why petitioners' reliance upon § 1988 must fail. The statute expressly limits the authority granted federal courts to look to the common law, as modified by state law, to instances in which that law "is not inconsistent with the Constitution and laws of the United States." Yet if we were to look to California law imposing vicarious liability upon municipalities, as petitioners would have us do, the result would effectively be to subject the County to federal court suit on a federal civil rights claim. Such a result would seem to be less than consistent with this Court's prior holding in *Monroe* v. *Pape*, 365 U. S., at 187–191, that Congress did not intend to render municipal corporations liable to federal civil rights claims under § 1983. See, *e. g.*, *Brown* v. *Town of Caliente*, 392 F. 2d 546 (CA9 1968); *Ries* v. *Lynskey*, 452 F. 2d 172, 174–175 (CA7 1971); *Brown* v. *Ames*, 346 F. Supp. 1173, 1176 (Minn. 1972); *Wilcher* v. *Gain*, 311 F. Supp. 754, 755 (ND Cal. 1970).

Petitioners argue, however, that there is in fact no inconsistency between the interpretation placed upon § 1983 in *Monroe* and the interpretation of § 1988 for which they now argue here. They suggest that *Monroe* involved no question of the susceptibility to suit of a municipality which has surrendered its common law immunity under state law; the interpretation of § 1983 in *Monroe* was, in their view, premised upon an assumption that the municipality had not been deprived of its immunity. And Congress, petitioners argue, did not intend to exclude from the reach of § 1983 municipalities that have surrendered their immunity from suit under state law. Thus, they conclude that in a case such as this, where the municipality has lost its immunity, there is no inconsistency between § 1983 and the intro-

duction of the state cause of action against the County into federal law under § 1988.

In effect, petitioners are arguing that their particular actions may be properly brought against this County on the basis of § 1983. But whatever the factual premises of *Monroe*, we find the construction which petitioners seek to impose upon § 1983 concerning the status of municipalities as "persons" to be simply untenable.

In *Monroe*, the Court, in examining the legislative evolution of the Ku Klux Act of April 20, 1871, which is the source of § 1983, pointed out that Senator Sherman introduced an amendment which would have added to the Act a new section providing expressly for municipal liability in civil actions based on the deprivation of civil rights. Although the amendment was passed by the Senate,[20] it was rejected by the House,[21] as was another version included in the first Conference Committee report.[22] The proposal for municipal liability encountered strongly held views in the House on the part of both its supporters and opponents,[23] but the root of the proposal's difficulties stemmed from serious legislative con-

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[20] Cong. Globe, 42d Cong., 1st Sess., 704–705 (1871). The proposed amendment is quoted in *Monroe* v. *Pape*, 365 U. S. 167, 188 n. 38 (1961).

[21] Cong. Globe, 42d Cong., 1st Sess., 725 (1871).

[22] *Id.*, at 800–801. The version proposed by the Conference Committee report is quoted in *Monroe* v. *Pape*, 365 U. S. 167, 188–189 n. 41 (1961).

[23] The essence of the position taken by the supporters of the provision imposing vicarious liability on local municipalities for injuries suffered due to the violation of civil rights was "that by making the whole body of citizens insurers for the victims you will have a safeguard which no police arrangement can make, one more effective than any other . . . ." Cong. Globe, 42d Cong., 1st Sess., 794 (1871) (remarks of Rep. Kelley). See also *id.*, at 792 (remarks of Rep. Butler). As to general view in opposition, see *id.*, at 788–789 (remarks of Rep. Kerr); *id.*, at 791 (remarks of Rep. Willard).

cern as to Congress' constitutional power to impose liability on political subdivisions of the States."[24]

As in *Monroe*, we have no occasion here to "reach the constitutional question whether Congress has the power

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[24] For instance, Representative Kerr argued:

"I now come to inquire is it competent for the Congress of the United States to punish municipal organizations of this kind in this way at all, with or without notice? My judgment is that such power nowhere exists; that it cannot be found within the limits of the Constitution; that its exercise cannot be justified by any rational construction of that instrument. I hold that the constitutional power of the Federal Government to punish the citizens of the United States for any offenses punishable by it at all may be exercised and exhausted against the individual offender and his property; but when you go one inch beyond that you are compelled, by the very necessities which surround you, to invade powers which are secured to the States, which are a necessary and most essential part of the autonomy of State governments, without which there can logically be no State government." *Id.*, at 788.

Similarly, Representative Willard explained his opposition to the amendment as follows:

"Now, sir, the Constitution has not imposed, we have not by the Constitution imposed, any duty upon a county, city, parish, or any other subdivision of a State, to enforce the laws, to provide protection for the people, to give them equal rights, privileges, and immunities. The Constitution has declared that to be the duty of the State. The Constitution, in effect, says that no State shall deny to its citizens the equal protection of the laws, and I understand that that declaration, that prohibition, applies only to the States, so far as political or municipal action is concerned. But the State, within its boundaries, has the creation and the control of the laws for the protection of the people." *Id.*, at 791.

And Representative Poland contended:

"As I understand the theory of our Constitution, the national Government deals either with States or with individual persons. So far as we are a national Government in the strict sense we deal with persons, with every man who is an inhabitant of the United States, as if there were no States, towns, or counties; as if the whole county were in one general mass, without any subdivisions of States, counties, or towns. We deal with them as citizens or inhabitants of this

to make municipalities liable for acts of its officers that violate the civil rights of individuals." 365 U. S., at 191. For in interpreting the statute it is not our task to consider whether Congress was mistaken in 1871 in its view of the limits of its power over municipalities; rather, we must construe the statute in light of the impressions under which Congress did in fact act, see *Ries* v. *Lynaksy*, 452 F. 2d 172, 175 (CA7 1971). In this respect, it cannot be doubted that the House arrived at the firm conclusion that Congress lacked the constitutional power to impose liability upon municipalities, and thus, according to Representative Poland, the Senate Conferees were informed by the House Conferees that the "section imposing liability upon towns and counties must go out or we should fail to agree." [33] To save the Act, the proposal for municipal liability was given up.[34] It may be that even in 1871 municipalities which were subject to suit under state law did not pose in the minds of the legislators the constitutional problems that caused the defeat of the proposal. Yet nevertheless the proposal was rejected *in toto*, and from this action we cannot infer any congressional intent other than to exclude all municipalities—regardless whether or not their immunity has been lifted by state law—from the civil liability created in the Act of April 20, 1871,

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great Republic. With these local subdivisions we have nothing to do. We can impose no duty upon them; we can impose no liability upon them in any manner whatever." *Id.*, at 793.

See also *id.*, at 795 (remarks of Rep. Blair); *id.*, at 798 (remarks of Rep. Bingham).

[33] *Id.*, at 804.

[34] All reference to municipal liability was deleted from the provision submitted by the Conference Committee, and it was enacted as 42 U. S. C. § 1986 which imposes liability upon any person who has "knowledge that any of the wrongs conspired to be done, and mentioned in" 42 U. S. C. § 1985.

and § 1983."[7] Thus, § 1983 is unavailable to these petitioners insofar as they seek to sue the County. And § 1988, in light of the express limitation contained within it, cannot be used to accomplish what Congress clearly refused to do in enacting § 1983.

Accordingly, we conclude that the District Court properly granted the motion to dismiss the causes of action brought against the County by petitioners under § 1983 and § 1988.

II

Although unable to establish a federal cause of action against the County on the basis of the California law imposing vicarious liability on a municipality for the actions of its officers that violate federal civil rights, petitioners contend that the District Court nevertheless had jurisdiction to hear their state law claims of vicarious liability against the County under the doctrine of pendent jurisdiction.

Petitioners rely principally upon the decision in *United Mine Workers* v. *Gibbs*, 383 U. S. 715, 725 (1966), where the Court eschewed the "unnecessarily grudging" approach of *Hurn* v. *Oursler*, 289 U. S. 238 (1933), to the doctrine of pendent jurisdiction. *Gibbs* involved a suit brought under both federal and state law by a contractor to recover damages allegedly suffered as a result

[7] Petitioners argue that merely because "Congress did not intend, as a matter of federal law, to impose vicarious liability upon a public entity for violations of the Civil Rights Acts committed by the entity's employees," it does not follow "that Congress also intended to preclude a state from imposing such vicarious liability as a matter of state law." Reply Brief for Petitioners, at 4–5. Certainly this is true. But this fact does not assist petitioners, for the very issue here is ultimately what Congress intended federal law to be, and, as petitioners themselves recognize, Congress did not intend, *as a matter of federal law*, to impose vicarious liability on municipalities for violations of federal civil rights by its employees.

of a secondary boycott imposed upon it by a union. There existed independent federal jurisdiction as to the federal claim, but there was no independent basis of jurisdiction to support the state law claim. Nevertheless, the Court concluded that federal courts could exercise pendent jurisdiction over the state law claim.

In deciding the question of pendent jurisdiction, the *Gibbs* Court indicated that there were two distinct issues to be considered. First, there is the issue of judicial power to hear the pendent claim. In this respect the Court indicated that the requisite "power" exists

> "whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .' U. S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' The federal claim must have substance sufficient to confer subject matter jurisdiction on the Court. . . . The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole." *Id.*, at 725 (footnotes omitted).

Yet even if there exists power to hear the pendent claim, "[i]t has consistently been recognised that pendent jurisdiction is a doctrine of discretion, not of plaintiff's rights. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims even though bound to

apply state law to them . . . ." *Id.*, at 726. By way of explanation of the considerations which should inform a district court's discretion, the Court in *Gibbs* suggested, *inter alia*, that "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law," *ibid.*, and that "reasons independent of jurisdictional considerations, such as the likelihood of jury confusion in treating divergent legal theories of relief, [may] justify separating state and federal claims for trial," *id.*, at 727. In *Gibbs*, the Court found that the exercise of pendent jurisdiction over the state law claims was proper both as a matter of power and discretion.

In these cases, there is no question that petitioners' complaints stated substantial federal causes of action against the individual defendants under 42 U. S. C. § 1983. See *Monroe* v. *Pape*, 365 U. S. 167 (1961). Nor is there any dispute that the federal claims against the individual defendants and the state claims against the individual defendants may be said to involve "a common nucleus of operative fact." But beyond this, there is a significant difference between *Gibbs* and these cases. For the exercise of pendent jurisdiction over the claims against the County would require us to bring an entirely new party—a new defendant—into each litigation. *Gibbs*, of course, involved no such problem of a "pendent party,"[22] that is, of the addition of a party which is implicated in the litigation only with respect to the pendent state law claim and not also with respect to any claim as to which there is an independent basis of federal jurisdiction. Faced with this distinction, the courts below concluded that the exercise of pendent jurisdiction

[22] See generally Note, UMW v. Gibbs and Pendent Jurisdiction, 81 Harv. L. Rev. 657, 662–664 (1968).

in the context of these cases was inappropriate as a matter of both judicial power and discretion.

As to the question of judicial power, the District Court and Court of Appeals considered themselves bound by the Ninth Circuit's previous decision in *Hymer* v. *Chai*, 407 F. 2d 136 (1969), wherein the court refused to permit the joinder of a pendent plaintiff. Petitioners vigorously attack the decision in *Hymer* as at odds with the clear trend of lower federal court authority since this Court's decision in *Gibbs*. It is true that numerous decisions throughout the courts of appeals since *Gibbs* have recognized the existence of judicial power to hear pendent claims involving pendent parties where "the entire action before the court comprises but one constitutional 'case'" as defined in *Gibbs*.[20] *Hymer* stands virtually alone against this post-*Gibbs* trend in the courts

[20] See *Almenares* v. *Wyman*, 453 F. 2d 1075, 1083–1085 (CA2 1971); *Leather's Best, Inc.* v. *S. S. Mormaclynx*, 451 F. 2d 800, 809–810 (CA2 1971); *Nelson* v. *Keefer*, 451 F. 2d 289, 291 (CA3 1971); *Astor-Honor, Inc.* v. *Grosset & Dunlap, Inc.*, 441 F. 2d 627 (CA2 1971); *F. C. Stiles Contracting Co.* v. *Home Insurance Co.*, 431 F. 2d 917, 919–920 (CA6 1970); *Beautytuft, Inc.* v. *Factory Insur. Assn.*, 431 F. 2d 1122, 1128 (CA6 1970); *Hatridge* v. *Aetna Casualty & Surety Co.*, 415 F. 2d 809, 816–817 (CA8 1969); *Stone* v. *Stone*, 405 F. 2d 94 (CA4 1968); *Connecticut General Life Insur. Co.* v. *Craton*, 405 F. 2d 41, 48 (CA5 1968); *Jacobson* v. *Atlantic City Hospital*, 392 F. 2d 149, 153–154 (CA3 1968); *Wilson* v. *American Chain & Cable Co.*, 364 F. 2d 558, 564 (CA3 1966). See also, *e. g.*, *Eidschun* v. *Pierce*, 335 F. Supp. 606, 609–610 (SD Iowa 1971); *Thomas* v. *Old Forge Coal Co.*, 329 F. Supp. 1000 (MD Pa. 1971); *Newman* v. *Freeman*, 262 F. Supp. 105, 107–109 (ED Pa. 1966); *Johns-Manville Sales Corp.* v. *Chicago Title & Trust Co.*, 261 F. Supp. 905, 907–908 (ED Ill. 1966); *Morris* v. *Gimbel Brothers, Inc.*, 246 F. Supp. 984 (ED Pa. 1965). On occasion, decisions of district courts refusing to exercise jurisdiction over claims against pendent parties have been sustained on appeal simply on the ground that the decisions were not an abuse of discretion. See *Putnam* v. *City of Greensburg*, 419 F. 2d 1300, 1302 (CA6 1969); *Williams* v. *United States*, 405 F. 2d 951, 955 (CA9 1969).

of appeals,[20] and significantly *Hymer* was largely based on the Court of Appeals' earlier decision in *Kataoka* v. *May Department Stores Co.*, 115 F. 2d 521 (CA9 1940), a decision which predated *Gibbs* and the expansion of the concept of pendent jurisdiction beyond the narrow limits set by *Hurn* v. *Oursler*, *supra*. Moreover, the exercise of federal jurisdiction over claims against parties as to whom there exists no independent basis for federal jurisdiction finds substantial analogues in the joinder of new parties under the well-established doctrine of ancillary jurisdiction in the context of compulsory counterclaims under Fed. Rules Civ. Proc. 13 (a) and 13 (h),[21] and in the context of third-party claims under Fed. Rule Civ. Proc. 14 (a).[22] At the same time, the County coun-

[20] The only court of appeals decision outside of the Ninth Circuit cited to us by the County in support of its position is *Wojtas* v. *Village of Niles*, 334 F. 2d 797 (CA7 1964), a decision which preceded the expansion of pendent jurisdiction in *United Mine Workers* v. *Gibbs*. A number of district courts, however, have refused to exercise jurisdiction over claims against pendent parties, generally relying on *Wojtas* and/or *Hymer* v. *Chai*. See, *e. g.*, *Redden* v. *Cincinnati, Inc.*, 347 F. Supp. 1229, 1231 (ND Ga. 1972); *Payne* v. *Mertens*, 343 F. Supp. 1355, 1358 (ND Cal. 1972); *Barrows* v. *Faulkner*, 327 F. Supp. 1190 (ND Okla. 1971); *Letmate* v. *Baltimore & O. R. Co.*, 311 F. Supp. 1059, 1060–1062 (Md. 1970); *Tucker* v. *Shaw*, 308 F. Supp. 1, 9–10 (EDNY 1970); *Hall* v. *Pacific Maritime Assn.*, 281 F. Supp. 54, 61 (ND Cal. 1968); *Rosenthal & Rosenthal, Inc.* v. *Aetna Casualty & Surety Co.*, 259 F. Supp. 624, 630–631 (SDNY 1966).

[21] See, *e. g.*, *H. L. Peterson Co.* v. *Applewhite*, 383 F. 2d 430, 433–434 (CA5 1967); *Albright* v. *Gates*, 362 F. 2d 928 (CA9 1966); *Union Paving Co.* v. *Downer Corp.*, 276 F. 2d 468, 471 (CA9 1960); *United Artists Corp.* v. *Masterpiece Productions, Inc.*, 221 F. 2d 213, 216–217 (CA2 1955); *Markus* v. *Dillinger*, 191 F. Supp. 733, 735 (ED Pa. 1961); cf. *Dewey* v. *West Fairmont Gas Coal Co.*, 123 U. S. 329 (1887); *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, 608–609 (1926).

[22] See, *e. g.*, *Pennsylvania R. Co.* v. *Erie Ave. Warehouse Co.*, 302 F. 2d 843, 844 (CA3 1962); *Southern Milling Co.* v. *United States*,

sels that the Court should not be quick to sweep state law claims against an entirely new party within the jurisdiction of the lower federal courts which are courts of limited jurisdiction—a jurisdiction subject, within the limits of the Constitution, to the will of Congress, not the courts." Whether there exists judicial power to hear the state law claims against the County is, in short, a subtle and complex question with far reaching implications. But we do not consider it appropriate to resolve this difficult issue in the present case, for we have concluded that even assuming *arguendo* the existence of power to hear the claim, the District Court, in exercise of its legitimate discretion, properly declined to join the claims against the County in these suits.

The District Court indicated, and the Court of Appeals agreed, that exercise of jurisdiction over the state law claims was inappropriate for at least two reasons. First, the District Court pointed out that it "would be called upon to resolve difficult questions of California law upon which state court decisions are not legion."[34] In addition, the court felt that "with the introduction of a claim against the County under the California Tort Claims Act, with the special defenses available to the County, the case" which will be tried to a jury, "could become unduly complicated."[35] As is evident from this Court's decision in *Gibbs*, 383 U. S., at 726–727, the unsettled nature of state law and the likelihood of jury confusion were entirely appropriate factors for the District Court to consider. And those factors had to be

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270 F. 2d 80, 84 (CA5 1959); *Dery v. Wyer*, 265 F. 2d 804, 807–808 (CA2 1959); *Waglander-Peterson Co. v. Great No. R. Co.*, 201 F. 2d 408, 415 (CA8 1953).

[33] Cf. Shackman, The New Pendent Jurisdiction of the Federal Courts, 20 Stan. L. Rev. 262, 265–266, 270–271 (1968).

[34] App. F to Petition for Certiorari, at 27–28 n. 5.

[35] *Ibid.*

weighed by the District Court against the economy which might be achieved by trying the petitioners' claims against both the police and the County in single proceedings. In light of the broad discretion which district courts must be given in evaluating such matters, we cannot say that the District Judge in these cases struck the balance improperly.[24] We therefore hold that the District Court did not err, as a matter of discretion, in refusing to exercise pendent jurisdiction over petitioners' claims against the County.

III

There remains, however, the question whether the District Court had jurisdiction over petitioner Moor's state law claim against the County on the basis of diversity of citizenship, 28 U. S. C. § 1332 (a). Petitioner Moor, a citizen of Illinois, contends that the County is a citizen of California for the purposes of federal diversity juris-

[24] Since we hold in Part III that the County is a citizen of California for purposes of diversity jurisdiction, the state law claim against the County will in fact be before the District Court on remand in the *Moor* case. But this fact does not in our opinion call for further consideration of the pendent jurisdiction issue by the District Court. Given our decision in Part III, the issue of pendent jurisdiction is without further consequence for petitioner Moor. And it is clear that the mere fact that the County will be before the District Court in petitioner Moor's case does not significantly affect the basis of the District Court's discretionary judgment with respect to petitioner Rundle's suit. For counsel for petitioners specifically indicated at oral argument that the petitioners' suits were consolidated only for purposes of appeal, and that petitioners' "injuries are different and the cases will be tried separately," Tr. of Oral Arg., at 47. Thus, even considering our decision in Part III as to petitioner Moor's claim against the County, we see no reason to upset the District Court's determination that it would not hear the complicating state law claim against the County where, as in Rundle's suit, it has a choice in light of the substantial element of discretion inherent in the doctrine of pendent jurisdiction.

diction. The District Court concluded otherwise, however. For while acknowledging that there exists a substantial body of contrary authority, it considered itself "bound to recognize and adhere to the Ninth Circuit decisions which hold that California counties and other subdivisions of the State are not 'citizens' for diversity purposes,"[11] see *Miller* v. *County of Los Angeles*, 341 F. 2d 964 (CA9 1965); *Lowe* v. *Manhattan Beach City School Dist.*, 222 F. 2d 258 (CA9 1955). Not surprisingly, the Court of Appeals also adhered to its prior precedents.

There is no question that a State is not a "citizen" for purposes of the diversity jurisdiction. That proposition has been established at least since this Court's decision in *Postal Telegraph Cable Co.* v. *Alabama*, 155 U. S. 482, 487 (1894). See also *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 63 (1904). At the same time, however, this Court has recognized that a political subdivision of a State, unless it is simply "the arm or *alter ego* of the State,"[12] is a citizen of the State for diversity purposes. See, *e. g.*, *Bullard* v. *City of Cisco*, 290 U. S. 179 (1933); *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472, 485–486 (1900); *Chicot County* v. *Sherwood*, 148 U. S. 529, 533–534 (1893); *Lincoln County* v. *Luning*, 133 U. S. 529 (1890); *Cowles* v. *Mercer County*, 7 Wall. 118 (1868). The original source of this latter principle was the rule that corporations are citizens of the State in which they are formed, and are subject as such to the diversity jurisdiction of the federal courts.[13] See, *e. g.*, *The Louisville, C. & C. R. Co.* v. *Letson*, 2 How. 497, 558–559 (1844); *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100,

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[11] App. E to Petition for Certiorari, at 18–19.

[12] *State Highway Comm'n of Wyoming* v. *Utah Construction Co.*, 278 U. S. 194, 199–200 (1929).

[13] Under 28 U. S. C. § 1332 (c), a corporation is, of course, also a citizen of "the State where it has its principal place of business."

196 (1898). Thus, in the seminal case of *Cowles* v. *Mercer County*, *supra*, the Court held without hesitation that an Illinois county, which under Illinois law was a "body politic and corporate" and had been authorised to sue and be sued, was subject to federal diversity jurisdiction as a citizen of the State of Illinois.[9] The principle first announced in *Cowles* has become so firmly rooted in federal law that we were able to say only last Term that "[i]t is well settled for purposes of diversity of citizenship, political subdivisions are citizens of their respective states . . . ." *Illinois* v. *City of Milwaukee*, 406 U. S. 91, 97 (1972).

The County in this case contends, however, that unlike the counties of most States, it is not a municipal corporation or an otherwise independent political subdivision, but that it is, under California law, nothing more than an agent or a mere arm of the State itself. In particular, the County cites to us Art. 11, § 1, of the California Constitution which provides that "[t]he State is divided into counties which are legal subdivisions of the State." The County thus apparently believes its status, for purposes of the diversity jurisdiction, to be governed by *Postal Telegraph Cable* rather than by *Cowles* and its progeny. Despite the County's contentions, a detailed examination of the relevant provisions of California law—beyond simply the generalization contained in Art. 11, § 1, of the state constitution—

[9] Indeed, Mercer County was able to point to a provision of state law that limited liability of Illinois counties to suit in the circuit courts of the county itself. Nevertheless, this Court concluded that "no statute limitation of suability can defeat jurisdiction given by the Constitution," 7 Wall., at 122. Moreover, subsequent to *Cowles*, the Court ruled that a County was subject to the diversity jurisdiction even where there was no state statute under which counties were authorised to sue and be sued. See *Chicot County* v. *Sherwood*, 148 U. S. 529, 531, 533–534 (1893).

convinces us that the County cannot be deemed a mere agent of the State of California.

Most notably, under California law a county is given "corporate powers" [41] and is designated a "body corporate and politic." [42] In this capacity, a county may sue and be sued,[43] and, significantly for purposes of suit, it is deemed to be a "local public entity" [44] in contrast to the State and state agencies.[45] In addition, the county, and from all that appears the county alone,[46] is liable for all judgment against it and is authorized to levy taxes to pay such judgments.[47] A California county may also sell, hold, or otherwise deal in property,[48] and it may contract for the construction and repairs of structures.[49] The counties also are authorized to provide a variety of public services such as water service, flood control, rubbish disposal, and harbor and airport facilities.[50] Financially, the counties are empowered to issue general obligation bonds [51] payable from county taxes.[52] Such bonds create no obligation on the part of the State, except that the State is authorized to intervene and to impose county taxes to protect the bondholders if the county fails to fulfill its obligations voluntarily.[53] In sum, these pro-

[41] See Calif. Govt. Code Ann. § 23000.
[42] See *id.*, § 23003.
[43] See *id.*, §§ 945, 23004 (a).
[44] See *id.*, § 940.4.
[45] *See id.*, § 940.6.
[46] Thus, any liability on the part of the County as a result of this suit would be the County's alone; no obligation would arise with respect to the State.
[47] See Calif. Govt. Code Ann. § 60171.
[48] See *id.*, §§ 23004 (d), 25320–25539.
[49] See *id.*, §§ 23004 (c), 25450–25467.
[50] See *id.*, §§ 25600–26224.
[51] See *id.*, §§ 29900–29920.
[52] See *id.*, §§ 29922–29924.
[53] See *id.*, §§ 29925–29927.

visions strike us as persuasive indicia of the independent status occupied by California counties relative to the State of California.

But even if our own examination were not sufficient for present purposes, we have the clearest indication possible from California's Supreme Court of the status of California's counties. In *People ex rel. Younger* v. *County of El Dorado*, 5 Cal. 3d 480, 487 P. 2d 1183, 96 Cal. Rptr. 553 (1971), the Attorney General of the State sought a writ of mandate against two California counties to compel them to pay out certain allotted monies. Under state law, such a writ may be issued only to any "inferior tribunal, *corporation*, board, or person." Cal. Civ. Proc. Code § 1085 (emphasis added). In holding that the writ could be issued against the counties, the California Supreme Court said:

> "While it has been said that counties are not municipal corporations but are political subdivisions of the state for purposes of government . . . , *counties have also been declared public corporations or quasi-corporations*. . . . In view of Government Code section 23003 which provides that a county is 'a body corporate and politic,' and section 23004 (a) of the same code which states that counties may sue and be sued, we think that a *county is sufficiently corporate in character* to justify issuance of a writ to mandate it." 5 Cal. 3d, at 491 n. 12, 487 P. 2d, at 1199 n. 12, 96 Cal. Rptr., at 559 n. 12 (emphasis added).

See also *Pitchess* v. *Superior Court*, 2 Cal. App. 3d 653, 656, 83 Cal. Rptr. 41, 43 (1969).

We do not lightly reject the Court of Appeals' previous conclusion that California counties are merely part of the State itself and as such are not citizens of the State

for diversity purposes.[24] But in light of both the highest state court's recent determination of the corporate character of counties and our own examination of relevant California law, we must conclude that this County has a sufficiently independent corporate character to dictate that it be treated as a citizen of California under our decision in *Cowles* v. *Mercer County*, *supra*.

Thus, we hold that petitioner Moor's state law claim against the County is within the diversity jurisdiction. Accordingly, we reverse the judgment of the Court of Appeals in this respect and remand this case to the District Court for further proceedings consistent with this opinion.

It is so ordered.

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[24] We do think it bears noting, though, that the Court of Appeals, in initially concluding in *Miller* v. *County of Los Angeles*, 341 F. 2d 964 (CA9 1965), that California counties were not citizens for diversity purposes, made no effort to analyze independently the status of California counties but simply rested its decision on its prior opinion in *Lowe* v. *Manhattan Beach City School Dist.*, 222 F. 2d 258, 259 (CA9 1955). *Lowe* in fact did not involve a suit against a California county but rather a suit against a California school district. And, in *Lowe* the Court of Appeals did not undertake any analysis of the legal character of even California school districts—much less California counties—but instead rested its decision on the equally conclusory order of the District Court, see *Lowe* v. *Manhattan Beach City School Dist.*, No. 16646–WM Civil (SD Cal. 1954), reprinted in Brief for Petitioners, App. A. Moreover, district courts in States other than California within the Ninth Circuit have questioned the correctness of *Lowe* and *Miller*, and have refused to follow those decisions for counties of their own States. See *Universal Surety Co.* v. *Lescher and Mahoney Arch. & Eng.*, 340 F. Supp. 303 (Ariz. 1972); *White* v. *Umatilla County*, 247 F. Supp. 918 (Ore. 1965).

SUPREME COURT OF THE UNITED STATES

No. 72–10

David Moor et al., Petitioners, v. County of Alameda et al. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May 14, 1973]

MR. JUSTICE DOUGLAS, dissenting.

The claims in the instant actions arose out of the May 1969, People's Park disturbance, in which appellants were allegedly injured by an Alameda County deputy sheriff who was performing duties at that time on behalf of the County. Appellants brought actions against several deputies, the sheriff, and the County. The complaints against the County alleged federal causes of action under the Civil Rights Act, 42 U. S. C. §§ 1981–1988, and pendent state claims under § 810 *et seq.* of the California Government Code. Both federal and state causes of action were premised on the theory that the County could be held vicariously liable for the acts of the deputies. The County subsequently filed motions to dismiss the claims against it in each case, contending that, as to the Civil Rights Act claims, the County was not a "person" who could be sued under the Act. The trial court ultimately granted these motions and ordered that all claims against the County be dismissed. The Court of Appeals affirmed these orders of the District Court (*Moor* v. *Madigan, et al.*, — F. 2d — (CA9, April 12, 1972).

42 U. S. C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

In *Monroe* v. *Pape*, 365 U. S. 167, we held that a municipality was not a "person" within the meaning of that Act. The issue was whether or not the Act made municipalities liable in damages, *id.*, pp. 187–191, that claim being strongly pressed because "private remedies against officers for illegal searches and seizures are conspicuously ineffective and because municipal liability will not only afford plaintiffs responsible defendants but cause those defendants to eradicate abuses that exist at the police level." *Id.*, at 191. We certainly said, as the Court holds, that a municipality was not a "person" within the meaning of § 1983. *Ibid.* But § 1983 permits equitable relief as well as damages not directly involved in *Monroe* v. *Pape* but a matter we explored at some length last Term in *Mitchum* v. *Foster*, 407 U. S. 225.

There may be overtones in *Monroe* v. *Pape*, that even suits in equity are barred. Yet we never have so held. Certainly a residuum of power seems available to § 1983 to enjoin such bizarre conduct as the offering to the police of classes in torture. More realistically, § 1983 as construed in *Mitchum* v. *Foster* might under some circumstances authorize a federal injunction against a municipal prosecution of an offender. Such being my understanding of *Monroe* v. *Pape* and *Mitchum* v. *Foster*, I would hold that the County of Alameda in this case is a "person" within the meaning of § 1983 for a narrow group of equity actions and that therefore the District Court did not lack jurisdiction.

Although the complaint in the instant action asked for damages, it also prayed for any further relief that the court might deem just and proper. Since the complaint

was dismissed at the threshold on the litigation, it is impossible to determine whether or not grounds for equitable relief would have emerged during the normal course of the litigation. But the prayer for "any further relief" would embrace it.

In any event an amended complaint could make the matter clear beyond peradventure.

That raises the question as to the liability of the County of Alameda, by reason of 42 U. S. C. § 1988, which reads:

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and if it is of a criminal nature, in the infliction of punishment on the party found guilty."

Under California law "A public entity may sue and be sued." (Government Code, § 945), although a public entity has a general immunity from suit involving injury. *Id.*, § 815. Moreover, an officer, while generally immune, may become liable in damages, if he uses unreasonable force against a citizen, in which event the municipality loses its immunity. That at least is the way I read *Scruggs v. Haynes*, 252 Cal. App. 2d 256.

Since § 1983 does not allow damages against the municipality in a federal suit, federal laws "are not adapted to the object," and are "deficient in the provisions necessary to furnish suitable remedies," within the meaning of § 1988. While it is "inconsistent" with "the laws of the United States," as those words were used in § 1988, to enforce a *federal cause* of action for damages against the County of Alameda, it arguably is within the scheme of the *state cause* of action. This is not to allow state law to enlarge the scope of § 1983. Section 1983 by reason of its equity provision merely gives "jurisdiction" to the District Court, while § 1988 allows the District Court to apply state law.

As we said in *Mitchum* v. *Foster:*

> "This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts." *Supra*, p. 242.

The federal right here is not to obtain damages but to obtain some kind of equitable relief. Application by the federal court of a state cause of action for damages is therefore in harmony with both § 1983 and § 1988. As we stated in *Sullivan* v. *Little Hunting Park*, 396 U. S. 229, 240, "This means, as we read § 1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes . . . . The rule of damages, whether drawn from federal or state sources is a federal rule responsive to the need whenever a federal right is impaired." The federal right here is the alleged "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" as these words are used in § 1983.

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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-10

DAVID MOOR, *et al.*,

Petitioners,

vs.

COUNTY OF ALAMEDA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING.

The Rundles, for themselves only, respectfully pray the Court to grant their petition for rehearing.[1]

[1]The petitioners originally were David Moor, William Donovan Rundle, Jr., a minor, by William D. Rundle, his guardian *ad litem*, William D. Rundle and Sarah Rundle. David Moor and the Rundles each filed separate suits in the District Court (see Appendix at 5 and 22). Because the issues raised on appeal to the court below in each case were identical, except that the Moor case involved the additional issue of diversity jurisdiction, the court below ordered the appeals consolidated. (See Appendix C to Petition for Certiorari, at 14.) As a result of the Court's opinion dated May 14, 1973, David Moor prevailed on the diversity jurisdiction issue, thus rendering the other jurisdictional issues moot as to him. However, because the Rundles cannot claim diversity jurisdiction, and because they did not prevail on their Civil Rights Acts jurisdiction claim, they alone are now seeking a rehearing on the pendent jurisdiction portion of their case.

I.

The Court's Decision Not to Rule on the Issue of Whether Judicial Power Exists to Join a Pendent Party Stems Entirely From a Mistake of Fact in That the District Court Never Decided, as a Matter of Discretion, Not to Hear the State Law Claims Against the County, but Rather Predicated Its Decision Solely Upon a Lack of Judicial Power.

The sole basis for the Court's decision not to rule on the issue of whether judicial power exists to hear pendent claims involving pendent parties was its assumption that the District Court, "in exercise of its legitimate discretion, properly declined to join the claims against the County in these suits." (Slip Opinion No. 72-10, at 22.) Yet, any fair reading of the District Court's decision on this issue (Appendix F to Petition for Certiorari, at 21) refutes that hypothesis and compels the conclusion that the District Court refused to hear the pendent state law claims against the County solely because it believed that it lacked the judicial power to exercise any discretion in view of *Hymer v. Chai*, 407 F.2d 136 (9th Cir. 1969). Indeed, there is nothing in the District Court's decision on pendent jurisdiction which can even remotely be said to evidence that that decision results from an exercise of discretion.

At the time the pendent jurisdiction issue was raised in the District Court, the focus of the parties was on the question of judicial power. (Appendix F to Petition for Certiorari, at 22.) In ruling against the petitioners, the District Court stated:

> "While plaintiff has skillfully briefed many interesting arguments, the court concludes that *at least within the Ninth Circuit*, the defendant County is correct that *pendent jurisdiction is not*

available in the circumstances of this case. Accordingly, the court does not reach plaintiff's other contentions.

"The *controlling point* is that in the Ninth Circuit pendent jurisdiction is available only to join claims, not to join parties. *Hymer v. Chai,* 407 F. 2d 136 (1969). That is, the concept applies 'only where the same parties are involved on the state and federal claims.' Wright, *Federal Courts* (2nd Ed. 1970), at 65. *Since there is no federal claim alleged against the County, no state claim against the County is within the pendent jurisdiction of this court, no matter how closely related factually that state claim may be to a federal claim against another defendant.* On this view of the doctrine—viz. that *the doctrine is simply not available—this court is devoid of the power to adjudicate the state claim against the County; the issue is not one of discretion.* See *United Mine Workers v. Gibbs,* 383 U.S. 715, 725-26 (1966)." *Id.* at 22-23. (Emphasis added.)

The District Court, thus, could not have made any clearer the fact that its decision was based entirely upon a lack of judicial power. The District Court stated unequivocally that within the Ninth Circuit "pendent jurisdiction is not available in the circumstances of this case" and that the doctrine is available "only to join claims, not to join parties." Moreover, the District Court stated that "no matter how closely related factually [a] state claim may be to a federal claim" to the extent that the pendent state law claim involves the potential joinder of a pendent party, "this court is devoid of the power to adjudicate the state claim against the County; *the issue is not one of discretion.*"

The District Court went on to analyze *Hymer* and the fact that other courts of appeals have reached an opposite result on the question of judicial power. But, the District Court concluded:

> "The short and *authoritative* answer to plaintiff's latter contention is that whether or not the Ninth Circuit's position in *Hymer v. Chai* represents a dying view, that position was firmly stated *and is binding on this court.*" *Id.* at 24. (Emphasis added.)

To further evidence that the District Court's decision is predicated solely upon a lack of judicial power are the following statements from its decision:

> "The basic inquiry in this regard is whether the doctrine may be employed to allow the joinder of any party who could not otherwise be in a federal court. And on this point, *Hymer v. Chai* speaks quite directly: 'Joinder of claims, not joinder of parties, is the object of the doctrine.' 407 F.2d at 137.
>
> ". . . Thus, since the court in *Hymer* did not allow the doctrine of pendent jurisdiction to operate where its effect would have been to join an additional plaintiff, *Hymer v. Chai* counsels strongly against employing the doctrine where an additional defendant would be joined." *Id.* at 25.

Again, after further analyzing *Hymer*, the District Court concludes by stating:

> "What this analysis demonstrates is this: In *Hymer v. Chai*, the Ninth Circuit was presented with the most favorable of circumstances in which to apply pendent jurisdiction to join an additional party; the claims were state claims; they were

closely related; the 'pendent party' would be a plaintiff. Nonetheless, the court refused to apply the doctrine. In light of that decision, this court is *unable* to permit the application of the doctrine to the present case." *Id.* at 27. (Emphasis added.)

The use of the term "unable" is obviously not consistent with any discretionary analysis and again evidences that the District Court's decision is based solely upon a lack of judicial power.

Where then did the Court secure the notion that the District Court decided, as a matter of discretion, that the County could not be joined as a party defendant on the pendent state law claims? From the Court's opinion it seems that that notion derived entirely from footnote 5 of the District Court's decision. (Slip Opinion No. 72-10, at 22 ns. 34 and 35.) Yet, any fair reading of footnote 5 shows that the District Court was not basing its decision upon an exercise of discretion. Footnote 5 states:

> "*Without expressing any opinion on the following* (emphasis added), the court notes that even were it free of the influence of *Hymer v. Chai*, serious obstacles to the application of the doctrine would still present themselves. First, on the issue of the *power* to adjudicate the claim, the court would still be confronted with the reluctance of other federal courts to permit a pendent party defendant in a federal question case. See *Wojtas v. Village of Niles*, *Gautreau v. Central Gulf Steamship Corp.*, and *Tucker v. Shaw*, all *supra* at n. 3.
>
> "Moreover, on the issue of the court's *discretion* to adjudicate the pendent claim, there would still be

substantial doubts as to whether the state claim should be heard. The present action will be tried to a jury, and with the introduction of a claim against the County under the California Tort Claims Act, with the special defenses available to the County, the case could become unduly complicated. Further, this court would be called upon to resolve difficult questions of California law upon which state court decisions are not legion. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 726-27 (1966); Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 Stan. L.Rev. 262, 265-66 (1968)." Appendix F to Petition for Certiorari, at 27-28.

Thus, at the outset the District Court prefaces the entire footnote by stating: "Without expressing any opinion on the following, . . ." Nothing more could have been said to keep the footnote from being elevated to the status of an alternative basis of decision.

In addition, the District Court's observation about the reluctance of other federal courts to permit a pendent party defendant in federal question cases is clearly incorrect in view of cases such as *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800 (2d Cir. 1971) and *Connecticut Gen'l Life Ins. Co. v. Craton*, 405 F.2d 41 (5th Cir. 1968). Moreover, subsequent to the District Court's pendent jurisdiction decision *Eidschun v. Pierce*, 335 F.Supp. 603 (S.D. Iowa 1971), was decided. *Eidschun* is substantively identical to the *Rundle* case on the pendent jurisdiction issue. Thus, if the District Court were freed of the constraints of *Hymer* it would certainly review the first portion of its footnote statement on the "reluctance" of other federal courts in view of the above authorities.

As for the second paragraph of footnote 5, which is the District Court's only mention of discretion, it is simply wrong to ignore the District Court's prefatory statement that it was not expressing any opinion on the matter and to conclude that the statements made therein amount to an opinion. Moreover, the very issues which the District Court indicated might exist if the County were joined as a pendent party defendant will now have to be decided in any event by the District Court in the companion case of *Moor v. Madigan, et al.* in view of the Court's opinion on diversity jurisdiction. That fact alone, coupled with the subsequent *Eidschun* decision, could well cause the District Court to decide, as a matter of discretion, to hear the pendent state law claims against the County in the *Rundle* case if it were freed from the constraints of *Hymer*.

In sum, petitioners are not attempting to re-argue or to take issue with any aspect of the Civil Rights Acts jurisdiction claim that was decided on the merits against them. But, because petitioners have been so totally frustrated in their efforts to obtain a decision on the merits of the judicial power portion of their pendent jurisdiction claim,[2] and because the Court's refusal to decide the judicial power question may severely prejudice the petitioners' future efforts to consolidate their case with the *Moor* case for trial,[3] basic considerations of fairness alone dictate that the Court grant the petition for rehearing and decide whether the cases cited in footnote 29

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[2] Petitioners at all times have been aware of the discretionary aspect of the doctrine of pendent jurisdiction and, if they believed for one moment that the District Court's decision was predicated upon a legitimate exercise of discretion, they would not have wasted their time or the Court's in raising the judicial power argument, nor would they now be seeking a rehearing on this issue.

[3] See Part II, *infra*.

(Slip Opinion No. 72-10 at 20) or footnote 30 (*Id.* at 21) of its opinion are correct. Indeed, since the District Court never exercised its discretion, and, if *Hymer* is wrong on judicial power, which it must be if the cases cited in footnote 29 of the Court's opinion are correct, the Court should so hold and remand the *Rundle* case to the District Court so that it might then truly be free to exercise its discretion. For, at a minimum, the Court can have no doubt that the District Court's decision was strongly influenced by *Hymer*, and that in view of subsequent developments the District Court might now decide to keep the County as a defendant. *Cf. Picking v. Pennsylvania R. Co.*, 151 F.2d 240, 252 (3d Cir. 1945), *reh. denied*, 152 F.2d 753 (3d Cir. 1945).

II.

The Court's Decision Not to Rule on the Issue of Whether Judicial Power Exists to Join a Pendent Party May Severely Prejudice the Future Prosecution of This Case and the Companion Moor Case.

In footnote 36 of the Court's opinion (Slip Opinion No. 72-10, at 23), the Court somewhat unfairly dismisses the effect of its decision in the *Moor* case on the *Rundle* case by noting the comment of petitioners' counsel that the two cases were consolidated only for purposes of appeal. It is this counsel's recollection that this discussion occurred in the context of the Court's inquiry as to whether the consolidation of the *Rundle* and *Moor* cases would destroy diversity jurisdiction, and was made in an effort to explain how the cases became consolidated for presentation to the Court. To the ex-

tent that there was any indication that the two cases will be tried separately, such indication was premature as a substantial amount of discovery still remains to be done. Petitioners will not make any final decision on whether to move to have the two cases consolidated for trial until discovery has been completed and the pretrial conference now scheduled for November 2, 1973 is held.

It is important to note, however, that petitioners did make a previous effort to have these cases consolidated for trial at a time when the County had been dismissed from the *Rundle* case, but was still a defendant in the *Moor* case on the basis of diversity jurisdiction. The respondents objected to this consolidation on the ground that the County was a defendant in one case and not in the other. The motion and opposition are attached hereto as Exhibits A and B respectively. The District Court never ruled on the motion as it was withdrawn by petitioners so that the status of the County as a defendant in each of the cases could first be resolved. See Exhibit C attached hereto.

Should petitioners now seek to consolidate the cases for trial for the reasons of judicial economy they previously advanced, they will undoubtedly be met by the same kind of opposition. Thus, if *Hymer* is wrong, then in fairness to petitioners they should at least have the opportunity to request the District Court to exercise its discretion free from the constraints of *Hymer* before they choose to again seek consolidation.

III.

The Court Has Apparently Sanctioned a Conflict Among the Circuits Which Goes to the Heart of Federal Judicial Power, and Which, Until Resolved, Leaves Divergent Jurisdictional Rights Among the Circuits and Induces Forum Shopping.

A review of the cases cited by the Court in footnotes 29 and 30 of its opinion (Slip Opinion No. 72-10, at 20 and 21, respectively) shows not only that an express conflict exists among the courts of appeals as to whether there is judicial power to join a pendent party, but also that the issue has been raised in a wide variety of federal litigation and is continuing to be raised. Because of this conflict, Professor Moore recently stated:

> "Whether doctrine of pendent jurisdiction would permit the bringing in of a different party as to whom no federal claim exists as to which the state claim can be said to be pendent is not altogether clear." 3A J. Moore, Federal Practice ¶18.07 [1.-4] (Supp. 1972, at 31.)

As for the importance of the pendent party issue, the Court seemingly recognized it when it stated:

> "Whether there exists judicial power to hear the state law claims against the County is, in short, a subtle and complex question with far reaching implications." (Slip Opinion No. 72-10, at 22.)

Given, therefore, this express conflict and the recognized importance of the issue, why did the Court apparently sanction a result that furnishes litigants in federal courts with divergent jurisdictional rights dependent sole-

ly upon the circuit in which suit is brought, and which, of necessity, will induce forum shopping? If judicial power to join pendent parties is valid as a proposition of law in the Second, Third, Fourth, Fifth, and Eighth Circuits, surely litigants in the Ninth Circuit are entitled to the same right. Yet, that right to seek to join a pendent party does not presently exist in the Ninth Circuit since the court below expressly reaffirmed *Hymer* (Appendix A to Petition for Certiorari, at 10), and this Court has allowed *Hymer* to stand.

Moreover, the Court's opinion not only fails to clarify the law on pendent parties, but will, of necessity, insure more litigation on the judicial power question since the cases cited in footnotes 29 and 30 of the Court's opinion both cannot be correct. In addition, the Court has left a situation in which another case raising the same judicial power issue will, at some point, have to be brought before it since the express conflict cannot be allowed to remain. Thus, to say that the Court's opinion on pendent parties will raise more questions than it resolves is not, in any sense, hyperbole.

To evidence the significance of this conflict and the necessity to resolve it, the Court's attention is directed to the very recent cases of *Anthony v. Cleveland*, 355 F.Supp. 789 (D. Hawaii 1973), and *Shippers & Receivers Coop. Ass'n, Inc. v. Penn Cent. Tr. Co.*, 355 F.Supp. 949 (E.D. Pa. 1973), both of which were decided after argument in this case.

Anthony arose within the Ninth Circuit. When the plaintiff sought to invoke the doctrine of pendent

jurisdiction to join a pendent party, the district court held, on the basis of *Hymer* and its reaffirmation in this case by the court below,[4] that it was without the power to do so, stating:

> "In his final argument, Plaintiff contends that he can join his breach of contract claim against the University with his § 1983 action against the University officials under the doctrine of pendent jurisdiction. While four circuits have interpreted the Supreme Court's decision in United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), to uphold pendent jurisdiction claims even though they include 'extra' non-federal plaintiffs or defendants; the Ninth Circuit has taken a contrary position. In Hymer v. Chai, 407 F.2d 136, 137-138 (9th Cir. 1969), the court rejected any liberalization of the doctrine and held that pendent jurisdiction is available only to join claims, not parties. This decision was reaffirmed in Moor v. Madigan, 458 F.2d 1217, 1220-1221 (9th Cir. 1972), where appellants made the same contention advanced by Plaintiff here. Thus it is well settled that in the Ninth Circuit a § 1983 action against state agency employees will not permit a federal court to join the agency itself as a party solely on the basis of the pendent state claims." 355 F.Supp. at 793.

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[4]There is little likelihood that the Ninth Circuit Court of Appeals will change its position in *Hymer* because of a longstanding rule of the court below that no three-judge panel can overrule another such panel on a similar though not identical issue, *Carson v. United States*, 310 F.2d 558, 561-562 (9th Cir. 1962); *Halprin v. United States*, 295 F.2d 458, 461 (9th Cir. 1961); *Ellis v. Carter*, 291 F.2d 270, 273 n. 3 (9th Cir. 1961); *Upton v. C.I.R.*, 283 F.2d 716, 723 (9th Cir. 1960).

On the other hand, when the same pendent party question arose in the *Shippers & Receivers Coop.* case, which occurred within the Third Circuit, the district court allowed the pendent party joinder. In reaching its decision the court stated:

> "Since the *Gibbs* decision, the issue before this Court—whether the doctrine of pendent jurisdiction would permit the assertion of a related state claim against a separate and independent party against whom no federal claim exists—has not been conclusively resolved. *In fact, this issue has caused a substantial split among the federal appellate courts.* On one hand, the Court of Appeals of the Second, Fourth, Fifth, and Eighth Circuits have held that the broad language of *Gibbs* permits the assertion of federal jurisdiction over additional parties who were not involved in the federal claim and whose sole connection with the case stemmed from the pendent state law claim. The Sixth and Ninth Circuits, on the other hand, have rejected the above approach. *Apparently, in order to resolve the conflict between the Circuits, the Supreme Court granted certiorari to determine the question whether* Gibbs *allows a federal court to exercise jurisdiction over a party on a pendent state law claim when that party is not involved in the related federal claim.* Moor v. Madigan, 458 F.2d 1217 (9th Cir. 1972), cert. granted sub nom. Moor v. Alameda County, 409 U.S. 841, 93 S.Ct. 66, 34 L.Ed.2d 80 (1972). See 41 U.S. L.W. 3090." 355 F.Supp. at 952. (Emphasis added.)

Thus, at least one federal court has now stated that believed, as petitioners herein believed, that certiorari

was granted in this case to resolve the pendent party conflict. Surely, therefore, the timeliness and importance of the issue and the necessity of its resolution cannot be doubted.

In the final analysis the pendent party judicial power issue now presented to the Court far transcends the instant case, and is infinitely more far-reaching than either of the other jurisdictional issues already decided; for this issue goes to the very heart of a federal court's power to control the scope of the case before it. If the petitioners and the host of federal cases cited in footnote 29 of the Court's opinion are correct, then the pendent party concept is the logical consequence of *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). On the other hand, if the respondents and the cases cited in footnote 30 of the Court's opinion are correct, then the Court should say so. But, irrespective of how the Court chooses to rule, it should rule one way or the other and put an end to the continuing and ever-increasing litigation on the question of what *Gibbs* means in terms of judicial power.

IV.

Conclusion.

This petition for rehearing involves only the pendent jurisdiction issue. It seeks no more than to have an express conflict among decisions of the courts of appeals on federal judicial power resolved and, if resolved in petitioners' favor, a remand to the District Court so that the District Court might then truly exercise its discretion with the knowledge that it possesses the judicial power to do so.

To this end petitioners request that since the issue of judicial power has been briefed and argued, that

the Court modify Part II of its opinion and decide whether there is judicial power to join pendent parties, and if such power exists to remand the case to the District Court rather than speculate on whether the District Court exercised its discretion. Alternatively, if the Court feels that the issue should be further argued, it should set the case down for reargument at the earliest convenient time for the Court.

In making this request, petitioners are not unmindful of the fact that petitions for rehearing are rarely granted. Yet, given the patent inequity that has resulted to them from the Court's totally unsupported conclusion that the District Court's pendent party decision was based on an exercise of discretion, and the fact that an express conflict in decisions going to the very heart of federal judicial power still exists among the courts of appeals, petitioners submit that the pendent party issue would seem to have the requisite public importance to warrant the granting of their petition.

Respectfully submitted,

RONALD M. GREENBERG,
Counsel for Petitioners.

Certificate of Counsel.

I certify that this petition is presented in good faith and not for delay.

RONALD M. GREENBERG

EXHIBIT "A."

Notice of Motion for Consolidation; Points and Authorities and Affidavit of Ronald M. Greenberg in Support Thereof.

United States District Court, Northern District of California.

David Moor, Plaintiff, v. Frank I. Madigan, et al, Defendants. No. C 70-333 RFP.

William Donovan Rundle, Jr., etc., et al, Plaintiffs, v. Frank I. Madigan, et al, Defendants. No. C 70-334 RFP.

TO DEFENDANTS AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Friday, May 14, 1971, at 9:30 a.m., or as soon thereafter as the matter can be heard, in the courtroom of the Honorable Robert F. Peckham, United States District Judge, in the United States Courthouse Building, 450 Golden Gate Avenue, San Francisco, California, plaintiffs will move the court, pursuant to Rule 42(a), Fed. R. Civ. P., for an order that the above entitled actions be consolidated on the grounds that they involve common questions of law and fact and that consolidation will avoid unnecessary costs or delay.

Said motion will be based on this notice, the pleadings, records and files herein, the affidavit of Ronald M. Greenberg, and the memorandum of points and authorities attached hereto, and such evidence as may be presented on the hearing of said motion.

DATED: April 22, 1971.

RICHARDS, WATSON & DREYFUSS
By /s/ Ronald M. Greenberg
Ronald M. Greenberg
Attorneys for Plaintiffs

POINTS AND AUTHORITIES

Rule 42(a) of the Federal Rules of Civil Procedure authorizes the court to consolidate separate actions in order to avoid unnecessary expense and delay if they are pending before the court and involve "a common question of law or fact."

In *Cecil v. Missouri Public Service Corp.*, 28 F.Supp. 649 (W.D. Mo. 1939) the court held that four cases should be consolidated under Rule 42(a) where all plaintiffs were injured in the same accident:

> "In these four cases every question of law and fact in each case, except the extent of each plaintiff's injuries, is identical with the questions of law and fact in the three other cases. Certainly they are cases which the rule authorizes the court to consolidate."

In *Tiernan v. Dunn*, 295 F.Supp. 1251, 1252 (D.R.I. 1969), the court consolidated four cases which arose out of an automobile accident in which all of the parties were involved:

> "Certainly, where, as here, there are totally identical facts and legal theories involved in the various actions, consolidation seems appropriate."

It is apparent from the Affidavit of Ronald M. Greenberg, filed herewith, that these two actions involve identical issues of "law or fact."

For these reasons plaintiffs respectfully request that the above captioned matters be consolidated.

DATED: April 22, 1971.

Respectfully submitted,

RICHARDS, WATSON & DREYFUSS

By /s/ Ronald M. Greenberg

Ronald M. Greenberg

Attorneys for Plaintiffs

State of California, County of Los Angeles—ss.

RONALD M. GREENBERG, being first duly sworn, says:

I am associated with the firm of Richards, Watson & Dreyfuss, formerly Richards, Watson & Hemmerling, counsel for plaintiffs herein, and am the attorney primarily responsible for these matters.

On Feburary 12, 1970, I caused both of the above matters to be filed. Thereafter, on February 16, 1970, I filed a Notice of Related Cases. As a result, both matters were transferred in accordance with LR 101(g) of the Assignment Plan to the same judge.

Both cases arise out of a shooting incident that occurred on May 15, 1969, at approximately 3:45 p.m., in the vicinity of Parker and Chilton Way in the City of Berkeley, California. The evidence gathered to date shows that the defendant Lawrence L. Riche fired a shotgun at that time at least once and possibly twice and that the plaintiff David Moor and the plaintiff William Donovan Rundle, Jr., were both hit as a result of that shot or shots.

Because of this fact, the witnesses to the shooting incident in both cases are identical. Moreover, each of these two plaintiffs is a witness in the other's case. In addition, the evidence shows that both plaintiffs were taken from the scene of the shooting at the same time and by the same ambulance.

The defendants in both cases are identical with the possible exception of the defendant County of Alameda. However, since the County's liability is vicarious its presence has no real bearing on the presentation of the cases.

Further evidencing the identity of issues of fact and law in these two matters is the fact that the defendant

Riche was indicted by the United States Government in Case No. 70-87 for shooting the plaintiff William Donovan Rundle, Jr., and others. The only other person shown by the Government during the course of the trial to have been shot in the Rundle incident was the plaintiff David Moor. Both shooting victims testified in that case.

I sincerely believe that failure to consolidate these two actions would be an imposition on the time of the court and the jury. Both actions arose out of the same incident, involve the same legal theories and the same proof, with the sole exception of medical testimony. It appears that trial of these matters will be difficult and time consuming. The above mentioned criminal trial took two and a half weeks. Because of the additional defendants involved herein and the needed medical testimony, I anticipate that these cases will take approximately four to five weeks to try. That time would be doubled if the cases were tried separately. Plaintiffs have only limited financial resources and the expense of prosecuting two separate lawsuits involving, for the most part, the same witnesses would be needlessly burdensome.

Executed at Los Angeles, California, on April 22, 1971.

By /s/ Ronald M. Greenberg
Ronald M. Greenberg

Subscribed and sworn to before me April 22, 1971.

/s/ Laurie A. Wood
Notary Public in and for County of
Los Angeles, State of California

EXHIBIT "B."

Memorandum of Points and Authorities in Opposition to Motion to Consolidate.

In the United States District Court, for the Northern District of California.

William Donovan Rundle, Jr., etc., et al., Plaintiffs, vs. Frank I. Madigan, et al., Defendants. No. C-70-334-RFP.

David Moor, Plaintiff, vs. Frank I. Madigan, et al., Defendants. No. C-70 333-RFP.

Plaintiffs' motion to consolidate the *Moor* and *Rundle* cases should be denied since the factual and legal issues in the two cases are not identical, as plaintiffs allege.

First, if the County of Alameda is retained as a defendant in *Moor*, then entirely separate legal and factual issues are presented in that case. Under state law, alleged violations of Civil Rights are irrelevant—the issues against the County turn on negligence and intentional tort. Factual and legal issues relating to the special defenses applicable to the County would be principal to the case.

Second, the extent of participation in the riot by the two plaintiffs may differ. Plaintiff Rundle had been involved for some time prior to the time he was shot and was directly involved at the time he was shot. Plaintiff Moor was in a different location and there are different operative facts relative to his involvement and shooting.

Even though there are some common questions, consolidation is not necessary where there are other issues in one case that would be collateral to the other. *State*

Mut. Life Assur. Co. of America v. Peat, Marwick, Mitchell & Co., 49 F.R.D. 202 (N.Y. 1969).

Where consolidation would involve different parties and special limitations and defenses are available to only some defendants, consolidation will not be ordered. *Pica v. General Foods Corp.*, 18 F.R.D. 352 (Mass. 1955).

Where consolidation would result in confusion or prejudice it should not be ordered. *May v. Liberty Mut. Ins. Co.*, 35 F.R.D. 234 (Pa. 1964); *American Photocopy Eg. Co. v. Fair*, 35 F.R.D. 236 (Ill. 1963); see *U.S. v. Krauer*, 149 F.2d 519 (7th Cir. 1945), *aff'd* 328 U.S. 654.

Here, consolidation of these cases may result in confusion to the jury and would unduly complicate the trials of these matters. Plaintiffs' motion should be denied.

DATED: May 10, 1971.

Respectfully submitted,

CROSBY, HEAFEY, ROACH & MAY
Professional Corporation
By Peter W. Davis
Attorneys for Defendants

EXHIBIT "C."

Notice of Withdrawal of Motion for Consolidation.

United States District Court, Northern District of California.

David Moor, Plaintiff, v. Frank I. Madigan, et al., Defendants. No. C 70-333 RFP.

William Donovan Rundle, Jr., etc., et al., Plaintiffs, v. Frank I. Madigan, et al., Defendants. No. C 70-334 RFP.

TO DEFENDANTS AND TO THEIR ATTORNEYS OF RECORD:

Plaintiffs in the above captioned matters hereby withdraw their Notice of Motion for Consolidation filed on April 23, 1971 and scheduled for hearing on May 21, 1971.

Dated: May 14, 1971.

RICHARDS, WATSON & DREYFUSS
By Ronald M. Greenberg
Attorneys for Plaintiffs